S. Hrg. 100-911

SYNDICATED TELEVISION MUSIC COPYRIGHT REFORM ACT OF 1987

HEARING

BEFORE THE

SUBCOMMITTEE ON
PATENTS, COPYRIGHTS AND TRADEMARKS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

S. 698

A BILL TO AMEND TITLE 17, UNITED STATES CODE, TO PROHIBIT THE CONVEYANCE OF THE RIGHT TO PERFORM PUBLICLY SYNDICATED TELEVISION PROGRAMS WITHOUT CONVEYING THE RIGHT TO PERFORM ACCOMPANYING MUSIC

NOVEMBER 10, 1987

Serial No. J-100-44

Printed for the use of the Committee on the Judiciary

5521-5

U.S. GOVERNMENT PRINTING OFFICE
90-356 WASHINGTON : 1988

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

COMMITTEE ON THE JUDICIARY

JOSEPH R. BIDEN, Jr., Delaware, *Chairman*

EDWARD M. KENNEDY, Massachusetts
ROBERT C. BYRD, West Virginia
HOWARD M. METZENBAUM, Ohio
DENNIS DeCONCINI, Arizona
PATRICK J. LEAHY, Vermont
HOWELL HEFLIN, Alabama
PAUL SIMON, Illinois

STROM THURMOND, South Carolina
ORRIN G. HATCH, Utah
ALAN K. SIMPSON, Wyoming
CHARLES E. GRASSLEY, Iowa
ARLEN SPECTER, Pennsylvania
GORDON J. HUMPHREY, New Hampshire

Mark H. Gitenstein, *Chief Counsel*
Diana Huffman, *Staff Director*
Dennis W. Shedd, *Minority Chief Counsel*

Subcommittee on Patents, Copyrights and Trademarks

DENNIS DeCONCINI, Arizona, *Chairman*

EDWARD M. KENNEDY, Massachusetts
PATRICK J. LEAHY, Vermont
HOWELL HEFLIN, Alabama

ORRIN G. HATCH, Utah
ALAN K. SIMPSON, Wyoming
CHARLES E. GRASSLEY, Iowa

Edward H. Baxter, *Chief Counsel and Staff Director*

CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

Page
DeConcini, Hon. Dennis, a U.S. Senator from the State of Arizona 1
Kennedy, Hon. Edward M., a U.S. Senator from the State of Massachusetts 6
Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah 7
Simpson, Hon. Alan K., a U.S. Senator from the State of Wyoming 8
Heflin, Hon. Howell, a U.S. Senator from the State of Alabama 64
Grassley, Hon. Charles E., a U.S. Senator from the State of Iowa 68
Thurmond, Hon. Strom, a U.S. Senator from the State of South Carolina 70

PROPOSED LEGISLATION

S. 698, a bill to amend title 17, United States Code, to prohibit the conveyance of the right to perform publicly syndicated television programs without conveying the right to perform accompanying music 3

CHRONOLOGICAL LIST OF WITNESSES

Oman, Ralph, Register of Copyrights, Assistant Librarian for Copyright Services, accompanied by Dorothy Schrader, general counsel, Copyright Office 9
Wilson, Hon. Pete, a U.S. Senator from the State of California 72
Lombardo, Philip J., Citadel Communications, New York, NY 75
De Angelis, Richard, KPHO-TV, Phoenix, AZ 83
Cooney, C.E. "Pep", KPNX-TV, Phoenix, AZ 89
Arries, Leslie G., Jr., Buffalo Broadcasting Co., Buffalo, NY 89
Lehman, Bruce, counsel, All-Industry TV Music Licensing Committee 110
Post, Mike, Mike Post Productions, Burbank, CA 130
David, Hal, ASCAP 136
Cramer, Edward M., consultant, Broadcast Music, Inc., NY 144
Prager, A.H., chairman and president, SESAC, New York, NY 161
Cotton, William C., American Association of Advertising Agencies, Inc., New York, NY 247
Wehling, Robert L., representing the Association of National Advertisers, Washington, DC 254

ALPHABETICAL LIST AND MATERIAL SUBMITTED

Arries, Leslie G., Jr.:
  Testimony 89
  Prepared statement 93
Cooney, C.E. "Pep":
  Testimony 89
  Prepared statement 93
Cotton, William C.:
  Testimony 247
  Prepared statement 250
  Letter to Senator DeConcini, December 18, 1987, with responses to questions from:
    Senator DeConcini 267
    Senator Thurmond 270
Cramer, Edward M.:
  Testimony 144
  Prepared statement 147

Page

- Cramer, Edward M.—Continued
  - BMI responses to questions from:
    - Senator Grassley 221
    - Senator DeConcini 231
    - Senator Leahy 238
- David, Hal:
  - Testimony 136
  - Prepared statement 139
  - Letter to Senator DeConcini, December 22, 1987, with responses to questions from:
    - Senator DeConcini 184
    - Senator Grassley 192
    - Senator Leahy 204
    - Senator Thurmond 212
  - Letter from Leslie G. Arries, Jr., Chairman, All-Industry Television Station Music License Committee, to television stations, February 27, 1987. 218
- De Angelis, Richard:
  - Testimony 83
  - Prepared statement 85
- Gore, Hon. Albert, Jr.: Prepared statement 74
- Lehman, Bruce:
  - Testimony 110
  - Responses to questions submitted by:
    - Senator DeConcini 113
    - Senator Leahy 120
    - Senator Grassley 124
- Lombardo, Philip P.:
  - Testimony 75
  - Prepared statement 78
- Oman, Ralph:
  - Testimony 9
  - Prepared statement 11
  - Answers to questions from Senator Thurmond 61
- Post, Mike:
  - Testimony 130
  - Prepared statement 132
  - Response to questions from Senator Thurmond 182
- Prager, A.H.:
  - Testimony 161
  - Prepared statement 163
  - Supplemental statement 167
  - Letter to Senator DeConcini, December 18, 1987, with responses to questions from:
    - Senator Grassley 241
    - Senator DeConcini 244
    - Senator Leahy 246
- Wehling, Robert L.:
  - Testimony 254
  - Prepared statement 256
  - Supplemental statement 258
  - Letter to Senator DeConcini, December 18, 1987, with responses to questions from:
    - Senator DeConcini 267
    - Senator Thurmond 270
- Wilson, Hon. Pete:
  - Testimony 72
  - Prepared statement of Senator Albert Gore, Jr 74

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

- Statement of the National Music Publishers' Association, Inc., in opposition to S. 698 279
- Letter to Senator DeConcini, November 19, 1987, with statement of the position of the Songwriters Guild of America regarding S. 698 294
- Letter to Senator DeConcini, from Timothy S. Jensen, Volunteer Lawyers for the Arts, New York, NY, November 24, 1987 297

Page
Letter to Senator DeConcini, from John K. Uilkema, chairman, ABA, Chicago, IL, November 24, 1987 298
  Attachment: 1986 "Committee Reports," Section of Patent, Trademark and Copyright Law, American Bar Association 300

QUESTIONS AND ANSWERS

Letter to Ed Baxter, chief counsel and staff director, Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks, December 21, 1987, from Motion Pictures Association, Washington, DC, with responses from Mel D. Blumenthal, to questions from:
  Senator Thurmond 303
  Senator Mathias 308
Responses of Jack Valenti, president, Motion Picture Association of America, Inc., to questions submitted by:
  Senator Leahy 313
  Senator Thurmond 315
  Senator DeConcini 318
  Senator Mathias 319
  Letter from Leonard Kalcheim, Paramount Pictures Corporation, November 10, 1981, to Francis A. Martin III, president, Chronicle Broadcasting Co., San Francisco, CA 323

SYNDICATED TELEVISION MUSIC COPYRIGHT REFORM ACT OF 1987

TUESDAY, NOVEMBER 10, 1987

U.S. Senate,
Subcommittee on Patents,
Copyrights and Trademarks,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 226, Dirksen Senate Office Building, Hon. Dennis DeConcini (chairman of the committee) presiding.

Also present: Senators Kennedy, Leahy, Heflin, Hatch, Grassley, and Thurmond.

Staff present: Edward H. Baxter, chief counsel and staff director; Cecilia Swensen, legislative aid/chief clerk; John Leader, legal intern; Elizabeth McFall, staff assistant; Randy Rader, minority chief counsel (Subcommittee on Patents, Copyrights and Trademarks); Carolyn Osolinik, chief counsel for Senator Kennedy; Ann Harkins, chief counsel for Senator Leahy; Theresa Alberghini, professional assistant for Senator Leahy; Karen Kremer, chief counsel for Senator Heflin; Mamie Mills, counsel for Senator Heflin; Carl Hampe, counsel for Senator Simpson; and Peter Coniglio, counsel for Senator Grassley.

OPENING STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DeConcini. The Subcommittee on Patents, Copyrights and Trademarks of the Judiciary Committee will come to order.

We're going to have hearings today on S. 698, the Syndicated Television Music Copyright Reform Act. The subcommittee is pleased today to receive testimony on S. 698.

S. 698 was introduced by Senator Thurmond of South Carolina on March 10, 1987. Last year this subcommittee also held hearings on the predecessor bill on April 9, but the subcommittee did not vote on or mark up the measure. I believe that the very distinguished group of witnesses that we have assembled for the hearing today will be able to clarify for us some of the many points that have been unresolved throughout the committee's consideration of this bill and like bills in the past.

The issue is complicated, and a true understanding of all of the issues requires an understanding of copyright law as well as the working of the television industry. While the subcommittee may never be able to grasp all of the subtleties of syndicated television music copyright, I'm hopeful that after today's hearing the subcommittee will be knowledgeable enough about the issues to determine whether the subcommittee should take any action on this legislation.

Senator Thurmond has been a great deal of help to me in my career in the U.S. Senate. I respect his wisdom and judgment and experience. I'm pleased that I am in a position to hold these hearings, although he is the one that should get the credit for holding these hearings, because he has asked me to do so and he has done so many favors for me and I wanted to do them prior to this period of time of the year, but due to nomination matters before the subcommittee it was impossible to achieve. But I'm glad to be able to return the favor for my friend, the Senator from South Carolina.

The All Industry TV Music Licensing Committee was formed to address what many television stations saw as the problem of how television stations paid for the performance rights for syndicated television programming. These stations did not obtain the performance right to the music contained within the syndicated show when they purchased the performance rights to the show themselves. Instead the blanket license amendment had been worked out whereby the station paid a fee based on the percentage of their revenues to the composers' performance rights societies. These performance rights societies then distributed these fees to the individual composers and songwriters.

The committee believes that a system should be created to ensure that television stations pay a fair price and only for music actually used. The committee urged the Congress to require that television syndicators acquire and convey the music performance rights when they sell the programming to the television stations.

The opponents of S. 698 believe that the blanket licensing system has worked well for all concerned for over 40 years and that it should not be tampered with by Congress. The composers and songwriters argue that forcing them to accept a one-time payment for their creative work would result in a severe reduction of their ability to be fairly compensated.

The legislation would force them to negotiate payment for their work at a time when its value is truly unknown. The movie studios argue that the legislation would place a straitjacket on program producers' use of music and increase their program costs by requiring them to acquire performance rights to music they may never use.

In addition, the huge inventories in preexisting programmings would be highly vulnerable because it would be impossible to track down and acquire the performing rights to all of the music contained in them.

Finally, the performing rights societies argue that the blanket licensing system which they administer has performed a difficult function more efficiently and inexpensively than any other method. Although they would argue alternative payment systems, including source licensing, are available to broadcasting, the present system has been chosen because it works to the benefit of all parties.

[A copy of S. 698 follows:]

II

100TH CONGRESS
1ST SESSION

S. 698

To amend title 17, United States Code, to prohibit the conveyance of the right to perform publicly syndicated television programs without conveying the right to perform accompanying music.

IN THE SENATE OF THE UNITED STATES

MARCH 10, 1987

Mr. THURMOND (for himself, Mr. JOHNSTON, and Mr. NICKLES) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend title 17, United States Code, to prohibit the conveyance of the right to perform publicly syndicated television programs without conveying the right to perform accompanying music.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act shall be cited as the "Syndicated Television Music Copyright Reform Act of 1987".

SEC. 2. Title 17, United States Code, is amended by redesignating sections 113 through 118 as sections 114 through 119, respectively, and by inserting after section 112 the following new section:

★(Star Print)

"§ 113. Limitations on exclusive rights: use of musical works in syndicated television programs

"(a) Notwithstanding the provisions of section 106, no owner, assignee, or licensee of a copyrighted audiovisual work may convey the right to perform publicly such work by non-network commercial television broadcast without simultaneously conveying the right to perform in synchronization any copyrighted music which accompanies such audiovisual work.

"(b) Notwithstanding section 101 of this title, for purposes of this section, the term 'audiovisual work' means any motion picture, pre-recorded television program, or commercial advertisement.

SEC. 3. Section 106 of title 17, United States Code, is amended by striking out "118" and inserting in lieu thereof "119".

SEC. 4. Section 201 of title 17, United States Code, is amended by adding the following new subsection:

"(f) Whenever the right to perform by broadcast any motion picture or other audiovisual work containing a synchronous musical work as provided in section 113, is conveyed to any commercial broadcast station, the author or authors of such musical work (or in the case of a work made for hire the employer or employees who prepared the work) shall be entitled to an interest in any compensation paid to the owner of the copyright in such motion picture or other audiovisual work. The amount of such interest shall be determined by agreement between the owner of the copyright in the motion picture or other audiovisual work and the author(s) or employee(s) who prepared the work.

SEC. 5. The amendments made by this Act shall take effect on the date of enactment of this Act, except that the amendment made by section 1 shall not affect a public performance occurring during the one-year period beginning on the date of enactment of this Act pursuant to a contract executed before such date of enactment.

Senator DeConcini. I'm looking forward to the testimony we are to receive this morning and to the discussions which will follow. I hope that what we learn will clarify some of the contradictions that have characterized past testimony on the issue and will allow the subcommittee to make a well-informed decision on what procedures to follow after these hearings.

Now is Senator Wilson here?

Senator Kennedy. Mr. Chairman, may I make a brief statement?

Senator DeConcini. Excuse me, Senator Kennedy. I yield to the Senator from Massachusetts.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator Kennedy. Thank you very much, Mr. Chairman.

I want to express our appreciation to you for holding these hearings and for the attention that you have given to this very important and significant issue that affects many of the creative artists and the creative arts in general.

We begin hearings today on legislation to dramatically alter the manner in which performance rights for copyrighted music contained in syndicated TV programs are licensed. From the beginning of television, performance rights for music have been licensed through performing rights societies which serve composers and publishers by policing performance of copyrighted music, distributing performance payments, and serve broadcasters by acting as a clearinghouse for obtaining rights to perform copyrighted music.

Blanket licensing of performance rights began as a practical solution to prevent copyright infringements. Although blanket licensing continues to be the predominant means for obtaining music performance rights, it's not the only way. Program licenses for individual programs are also available from the performing rights societies and there are no legal obstacles to broadcasters obtaining source licenses for TV music from the producers of the shows or dealing with composers or songwriters directly.

The current system has worked very well. It protects the rights of composers, lyricists, music publishers, and provides performance rights to broadcasters at a reasonable price. The system has withstood legal challenges, and rates charged by the performing rights society are subject to continual judicial oversight. In fact, a trial date in Federal court has been set for January to examine the fairness of the ASCAP current rates. Congress must be very wary of enacting legislation that will scrap the current system for licensing music performance rights in favor of mandatory source licensing.

Continuing compensation for performance of copyrighted music is critically important to the creators of music because most are paid very little up front for their music. Much music never becomes popular, and producers are unwilling to pay significant sums for unproven musical works. Compensation based on frequency of performance assures the musical creator of a fair return while limiting the risk to producers.

There are two major obstacles with the legislation. It would require licensing of music performance rights through a method of source licensing which contains no protection for composers and songwriters to assure a fair and continuing payment for performance of their works. More importantly, the supporters of the bill have failed to demonstrate that any legislation is needed. The existing music licensing system is subject to court review and the parties are in court now, and Congress should not interject itself in this process.

I look forward to hearing from the witnesses.

Thank you.

Senator DeConcini. Thank you, Senator Kennedy.

I yield to my ranking member who has been a leader in this area for some time, the Senator from Utah, Senator Hatch.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator Hatch. Thank you, Senator DeConcini.

Mr. Chairman, as I am sure you're aware, this subcommittee held a hearing on this topic 1½ years ago, on April 9, 1986. Accordingly, I'm very interested to learn if anything has transpired in the intervening time that ought to persuade this subcommittee to reconsider this issue.

This bill would eliminate the current blanket license under which broadcasters acquire rights to use music composed and performed by artists who deserve compensation for their intellectual property and talents. In my judgment, the blanket license system operates on market principles to compensate composers on the basis of the popularity of their music and their renditions. Thus, composers receive copyright incentives to create and broadcasters receive the right to the music without laborious recordkeeping or protracted litigation.

Furthermore, the present system has allowed courts to review rates for fairness and reasonableness. In short, this 40-year-old policy does not appear to me to require alteration. By the same token, I have to say that I intend to take this excellent opportunity to review all the evidence and to ascertain the merits of the current system. I will assess the evidence carefully to ascertain if the proponents of this particular bill demonstrate that the current system is defective and may only be corrected by Federal Government intervention. If that's so, I'll be interested in that.

Moreover, it will be important to ascertain whether the proposed change would protect the interests of the various players protected by the marketplace including, I might add, composers. It seems to me that Congress should always be wary of those who ask Congress to intervene in what has been in the past a market dispute. Congress, and the Government in general, has a role to play in protecting the rules of the marketplace. If all participants are playing by the rules, however, and the rules are fair, I don't think Congress should take sides with one competitor or the other. I think that's where we get into trouble around this place. Accordingly, as I have said, I will review this record very carefully to ascertain if those rules are fair and followed by participants in the music marketplace.

So, with those thoughts in mind, I want to thank the chairman for convening this hearing. I look forward to listening to the witnesses and reviewing the record. I hope that we can arrive at a final resolution of this matter once and for all.

Senator DECONCINI. Thank you, Senator Hatch.

Senator Thurmond is——

Senator HATCH. Mr. Chairman, could I also put Senator Simpson's statement in the record? He's on the floor on the nuclear waste bill and would like to have this in the record.

Senator DECONCINI. Without objection, the Senator's statement will appear in the record at this point.

Senator HATCH. Thank you.

[The prepared statement of Senator Simpson follows:]

PREPARED STATEMENT OF HON. ALAN K. SIMPSON, A U.S. SENATOR FROM THE STATE OF WYOMING

"SOURCE LICENSING" LEGISLATION

I am pleased to join with my colleagues Senators Thurmond, Johnston, Nickles, Bumpers, Gramm, Breaux, Murkowski, and Helms in supporting the Syndicated Television Music Copyright Reform Act of 1987.

Today, television stations are confronted with a significant imbalance in the arrangements they must make in order to purchase broadcast rights to syndicated television programs. They may purchase rights for the actors' performance and the program's written content on a "per-program" basis, but they must purchase a "blanket license" for the music rights from the relevant music licensing organization (usually, ASCAP or BMI). Thus, they must pay for an entire catalog of music when they may only want to purchase the music rights to a particular syndicated program.

This strikes me as unfair and improper. Despite the admitted complexity of many intellectual property arrangements, it does not seem illogical to apply the old maxim, "you get what you pay for," to this business arrangement in order to come up with a similarly reasonable notion: "You don't have to pay for what you don't want."

Some have raised concerns about proper compensation of the composers and performers of syndicated TV music. I assure you that I will listen to those concerns closely, since I do believe that all artists and performers must be properly compensated. My voting record in the Subcommittee on Patents, Copyrights and Trademarks displays a continuing sympathy for the position of those creative people in intellectual property issues.

However, proper treatment for one party does not justify—and should not require—improper treatment for another party. While keeping the artistic community's concerns fully in mind, I believe it is possible to craft legislation which will address the present inequity in the system now utilized for providing rights to broadcase syndicated television programs. I am very pleased that Sentor Thurmond's new bill contains additional protections for creative persons. I would be prepared to review any other proposal which would ensure this group's continuing livelihood.

Finally, I would wish to thank the Chairman of the subcommittee, Senator DeConcini, for holding this hearing. This is a difficult issue, and I appreciate the interest and attention he has given to it.

Senator DECONCINI. Senator Thurmond is due to be here, but he's at another meeting. When he comes, we will interrupt and have him present his testimony.

Senator Wilson was going to testify. I believe he won't be here for a few minutes. Therefore, we are going to proceed with Mr. Ralph Oman, the Register of Copyrights.

Mr. Oman, would you please come forward and give your testimony. Summarize it for us. Your full statement will appear in the record.

STATEMENT OF RALPH OMAN, REGISTER OF COPYRIGHTS, ASSISTANT LIBRARIAN FOR COPYRIGHT SERVICES, ACCOMPANIED BY DOROTHY SCHRADER, GENERAL COUNSEL, COPYRIGHT OFFICE

Mr. OMAN. Thank you very much, Mr. Chairman.

With me at the witness table is Dorothy Schrader, the general counsel of the Copyright Office.

Senator DECONCINI. Welcome, Ms. Schrader.

Mr. OMAN. The Copyright Office has prepared a lengthy statement on S. 698, and I submit that for the record.

Today I would like to concentrate on the big change that Senator Thurmond has incorporated in this year's version of his source licensing bill, the residual system of payment for composers.

The copyright law never mentions source licensing or blanket licensing, so we're not here today to talk only about copyright law, which is the area of special expertise of the Copyright Office. In many ways what we are talking about are economic regulation, antitrust policy, and social policy. At some point you might want to ask the Chief of the Antitrust Division to analyze the anticompetitive and procompetitive aspects of blanket licensing and source licensing.

What I can provide as Register of Copyrights is an educated guess as to what impact the source licensing proposal will have on individual composers, the group of people we deal with on a daily basis at the Copyright Office.

Last year the local broadcasters paid almost 2 percent of their gross receipts to composers and publishers, close to $95 million. So we're talking about real money here.

This money goes into the total pot of almost half a billion dollars that the composers and publishers eventually share. The size of each composer's share depends on the popularity of his or her music.

During the hearings last year on source licensing the composers voiced strong opposition to the bill because it would replace a major source of their income with a great big question mark. They predicted, as you mentioned, Mr. Chairman, a major loss of income.

The broadcasters argued that the composers could negotiate a system of residuals like the residuals the actors, the writers, and the directors have hammered out in their bargaining with the producers of the syndicated programming. Residual agreements give actors, writers, and directors money for each repeated use of the program not foreseen at the time of the employment contract, at the time it was negotiated in the first place.

When "I Love Lucy" or "Leave it to Beaver" are syndicated on local television stations, the actors, the directors, and the screenwriters share in this aftermarket income. The composers don't. For a variety of reasons, composers have been denied the benefits of collective bargaining.

To answer this criticism, Senator Thurmond has changed his bill and proposes to give the composers an undefined interest in the money the local broadcasters pay the copyright owner for the programming. The composers and producers would negotiate the amount of this so-called interest.

Because the composers can't organize, they will have to negotiate individually with motion picture producers, the program producers. As someone who has looked down the business end of Jack Valenti from time to time, I predict that composers will not have an easy time negotiating with the Hollywood producers.

The bill does not create a legally enforceable statutory right. It really talks in generalities and doesn't give us a detailed blueprint for reform. So the composers are being asked to close their eyes, hold their nose, and jump.

The source licensing bill in the House contains a provision recognizing these composers as employers under the labor laws. But even if the composers could unionize, they wouldn't necessarily be able to protect their interests in negotiations with the motion picture companies. The former composers' union, before it was disbanded, was financially too weak to combat the studios. The studios have huge inventories of preexisting music in the can already, and they can-use it to break the back of any strike by composers.

As you requested, Mr. Chairman, I have not touched on the other issues raised by the bill, but I would be happy to do so in response to your questions, either now or in writing.

Let me say that even with the new residuals provision, the Copyright Office continues to harbor certain misgivings about the proposal. It would reorder the well-established and very complicated business practices involved with the licensing of music without giving us a workable alternative.

The current system seems to be, on balance, the best for achieving a degree of rough justice between the parties, and it's a system that's used in every other industrialized country in the world. It is also true to the underlying philosophies that Congress built into the 1976 Copyright Act.

I'm not saying it's a perfect system. I'm reminded of the old Churchill quote. He said that:

> Many forms of government have been tried and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all wise. Indeed, democracy is the worst form of government, except for all those other forms that have been tried from time to time.

I don't pretend that blanket licensing is perfect or all wise. It's just better than all the other alternatives.

Down the road, Mr. Chairman, the Copyright Office will be pleased to provide technical assistance, if you want it, to perfect the current draft, and if the subcommittee sees a role for the Copyright Office in an effort to work out a compromise between the parties, we are at your service.

Thank you very much, Mr. Chairman.

[Mr. Oman's submissions for the record follow:]

Summary

Statement of Ralph Oman
U.S. Register of Copyrights
November 10, 1987

Movie producers pay composers a fee for recording their compositions on film (the "synchronization right"). Originally, theatres had to buy a blanket license from ASCAP or a later-developed performing rights society, to clear the performing rights in the film music for theatrical exhibition, but this practice was changed in the late 1940's as a result of the court's finding in Alden-Rochelle that the practice violated the antitrust laws. The court ordered producers to clear all performing rights, including music, for theatres.

Performing rights societies continue to license performing rights in television music by granting blanket licenses to the networks and local stations. The courts supervise these licenses on a continuing basis under consent decrees negotiated with the Antitrust Division back in 1950. If a local television station thinks the negotiated license fees are unfair, it can ask the courts to review the reasonableness of the ASCAP rates. A rate review proceeding is pending. Over the years the broadcasters have repeatedly challenged the blanket licensing system on antitrust grounds, and in two recent landmark cases, the Supreme Court and the Second Circuit upheld the validity and the fairness of the blanket license system.

Through years of custom and practice, the blanket license has emerged as the most practical way to license music performance rights. Courts have regularly responded to the charges made by broadcasters and reviewed the blanket license. The rate of the license has been reduced, and the availability of other licensing methods, such as "per program" and "direct" has been stressed. Source licensing is also legally, if not conveniently, available.

Although composers of film and television music generally create under work-for-hire agreements that give the copyright to the producer, the custom and practice of 30 years is that the composers receive at least one-half of the performing rights royalties, in addition to whatever "up-front" compensation the producer pays them. The principle of continued payment for continued use of their creations is very important to composers and other creators.

S. 698 would change these long-standing practices legislatively; the bill mandates source licensing for music performance rights in syndicated programs. It warrants only one method of licensing and proposes to change a system that the courts have found functions competitively. The bill declares that composers are entitled to an "interest" in the producer's compensation for licensing syndicated programming. Without collective bargaining and collective enforcement of rights, it is difficult to conclude that composers would be adequately compensated. The bill should be evaluated in terms of its effect on the income of composers, the practical effectiveness of the collecting society system, and the copyright principle of divisibility of rights.

Prepared

Statement of Ralph Oman
Register of Copyrights
Assistant Librarian for Copyright Services

Before the Subcommittee on Patents, Copyrights and Trademarks
Senate Committee on the Judiciary
100th Congress, First Session
November 10, 1987

Mr. Chairman and members of the Subcommittee, I appreciate the opportunity to appear here today to testify on S. 698 (introduced by Senator Thurmond). This bill is specifically designed to aid local television stations by changing the current system for licensing performing rights in copyrighted music embodied in the soundtrack of non-network programs broadcast on television.

The bill would shift the responsibility for licensing these music performing rights from local broadcasters to program producers. It would do so by prohibiting the conveyance of the right to publicly perform an audiovisual work by a non-network commercial television transmission without simultaneously conveying the right to perform the music fixed in the soundtrack. This would eliminate the currently universal blanket licensing system for these performances, which is possible now because of separate licensing of the synchronization right and the performing right in copyrighted music, and would replace it with a mandatory "source licensing" system. Television stations a few years ago attempted to achieve that result through antitrust litigation against the performing rights societies, and the courts have upheld the legality of the blanket licensing system.

Under the blanket licensing systems, composers and songwriters annually receive roughly 30 million dollars from the broadcast of musical works embodied in televised programming impacted by the bill. Under S. 698 composers contend they are guaranteed nothing for the broadcast of their creations. Instead, they receive a right of "compensation" to be determined by negotiations with the motion picture producer.

The televised broadcast of musical works embodied in programming is a use of the composer's creation. The Copyright Clause of the Constitution arguably means that the composer is entitled to share in the revenue generated from exploitation of his or her creation as a matter of right. In the case of syndicated television, S. 698 would effectively prevent the composers from the collective enforcement of their rights through performing right societies. It proposes, instead, that the composers negotiate a fee at the time of creation with the original producer of the programming, just as they do in the case of feature length motion pictures.

A review of the historic development of the customs and practices of the entertainment industry will put in perspective the Copyright Office's analysis of S. 698.

I. BACKGROUND OF LICENSING RIGHTS IN TELEVISED MOTION PICTURES

A. The Performing Rights Societies.

In 1897, Congress established as one of the author's rights included in a copyright of a musical work the exclusive right to perform the work publicly;[1] under this right each individual public performance of a musical work was subject to the copyright owner's exclusive control, and each individual unauthorized performance of a musical work in public was an infringement. However, the composers and songwriters of musical works soon found it beyond their capacity to detect the unauthorized public performance of their works in theatres, dance halls, taverns, and other locations across the country. Furthermore, music users had no practical means to locate and negotiate licenses with composers whose music they wished to perform.[2]

---

[1] Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (current version at 17 U.S.C. §106(4)(1976)). For a discussion on the divisibility of the performing

To respond to these difficulties, a group of composers and musicians founded the American Society of Composers, Authors and Publishers (ASCAP) in 1914.[3] ASCAP developed a blanket licensing system whereby ASCAP's member composers and publishers would assign exclusive rights to ASCAP so that only ASCAP could license the public performance of the composers' copyrighted works. ASCAP in turn would license music users to publicly perform any music in ASCAP's repertory as often as desired, upon payment of an agreed-upon fee.[4] ASCAP acted on behalf of its members to guard against infringement of works in its repertory by monitoring public performances of music, bringing copyright infringement actions on behalf of its members, and serving as a clearinghouse for copyright owners by collecting and distributing to its member composers and publishers the royalties paid to ASCAP by licensees.[5]

---

right *see infra*, pp. 34-35.

[2] *Buffalo Broadcasting Co. v. ASCAP*, 546 F.Supp. 274, 277 (S.D.N.Y. 1982), *rev'd*, 744 F.2d 917 (2d Cir. 1984), *cert. den.* 105 Sup. Ct. 1181 (1985).

[3] *Id.*

[4] *Id.*

[5] Recent Development, *Blanket Licensing of Music Performing Rights:*

In 1940 Broadcast Music, Inc. (BMI) was founded by members of the radio broadcast industry to increase their bargaining power in negotiating performing rights licenses. SESAC Inc. (formerly called the Society of European Stage Authors and Composers), a privately owned society, is the smallest of the performing rights societies operating in the U.S.[6] ASCAP has emerged as the largest and most powerful of the performing rights societies.

B. Licensing of Music Performed in Movie Theatres.

When ASCAP was a fledgling organization, it monitored the public performances of musical compositions by bands and orchestras in hotels, theatres, and places of amusement, and it later monitored performances by radio broadcast.[7] When silent motion pictures were first shown in theatres, music was supplied by a piano player or an orchestra, but theatre owners refused to pay royalties for performing musical compositions in the theatre. However, after ASCAP brought a number of infringement suits against theatre owners, in 1923 theatre owners began obtaining blanket licenses whereby each theatre paid ASCAP an annual fee based on seating capacity.[8]

When motion pictures with sound were introduced in 1928, new licensing problems arose. At first, the sound portion of the motion picture was recorded on phonograph discs which were operated by the theatre in synchronization with the pictures projected on the screen. Later, the

---

Possible Solutions to the Copyright-Antitrust Conflict, 37 Vanderbilt L. Rev. 183, 186 (1984).

[6] S. Shemel & M.W. Krasilovsky, This Business of Music 184 (1985).

[7] Alden-Rochelle, Inc. v. ASCAP, 80 F.Supp. 888, 891 (S.D.N.Y 1948).

[8] Id. at 891-2.

"sound track" method evolved whereby the sound is recorded on a strip of sound cells attached to the film itself and converted with the aid of a photo-electric cell,[9] to electronic impulses that drive the speakers.

At this point, new copyright licensing practices developed. ASCAP member composers would license to movie producers the right to record their compositions on the film (the "synchronization right"), but expressly refused to license the performing rights in the music. The performing rights continued to be licensed through ASCAP directly to the movie theatres that actually performed the works. Motion picture producers rented their films to the theatre operators with a provision in the rental contract that the film would be exhibited only in theatres that held ASCAP licenses.[10] Often movie producers had a financial interest in the ASCAP pool of royalties, because many producers owned music publishing corporations who owned rights in ASCAP compositions and were entitled to share the 50 percent royalties distributed by ASCAP to music publishers.[11]

In 1942, motion picture exhibitors filed a complaint alleging that ASCAP and its members violated federal antitrust laws through the operation of the blanket license for the public performance of musical compositions in movie theatres.[12] The district court found that, although ASCAP licensing fees were "very reasonable,"[13] the combination of ASCAP members in transferring all their non-dramatic performing rights in an exclusive license to ASCAP was a combination in restraint of trade in violation of section one of the antitrust laws.[14] The court also found that the practices that had developed between motion picture producers and ASCAP members regarding the operation of the blanket license constituted an unlawful combination in restraint of trade.[15]

---

[9] _Id_. at 892.

[10] _Id_.

[11] _Id_. at 892-3.

[12] _Alden-Rochelle, Inc. v. ASCAP_, _supra_ note 7.

[13] _Id_. at 892.

In a separate proceeding,[16] the Alden-Rochelle court ordered ASCAP and its members to refrain from enforcing the motion picture performing rights of any musical compositions in its repertory and from obtaining any such performance rights in the future. In addition, the court, in effect, ordered composers to license the right of public performance in their musical compositions to the motion picture producers to whom they grant synchronization rights in those compositions at the source. Today we know this practice as "source licensing."

C. Licensing of Music Performed on Television.

1. Operation of the Blanket Licenses Pursuant to Consent Decrees. Ever since television became commercially viable in the 1940's, the national television networks and local television stations have obtained public performance licenses for the music included in their live and taped programming through ASCAP and BMI blanket licensing arrangements.[17] The first blanket license for television performing rights,

---

[14] Id. at 894.

[15] Id. at 894-5.

[16] Alden-Rochelle, Inc. v. ASCAP, 80 F.Supp. 900 (S.D.N.Y. 1948).

[17] Columbia Broadcasting System, Inc. v. ASCAP, 400 F.Supp. 737 (S.D.N.Y. 1975), rev'd 562 F.2d 130 (2d Cir. 1977), rev'd sub nom., BMI v. CBS, 441 U.S. 1 (1979) (networks); Buffalo Broadcasting v. ASCAP, 546 F.Supp. at 287 (local television stations).

offered by ASCAP from 1941 until its cancellation in 1948, was gratuitous.[18] At that time, while the Alden-Rochelle case was being litigated, ASCAP and BMI granted blanket licenses pursuant to 1941 consent decrees negotiated after the U.S. Justice Department sued each society as an unlawful combination in restraint of trade under the antitrust law.[19] ASCAP's 1941 consent decree prohibited ASCAP from acquiring exclusive performing rights from its members, and ordered ASCAP to provide the option of a per-program license to requesting licensees.[20] BMI's consent decree was similar, but it allowed BMI to retain the right to assert exclusive performing rights in compositions of which it owned the copyright or exclusive publishing rights.[21]

In 1950, ASCAP's 1941 consent decree, which was still valid with respect to blanket licenses for the performance of television music, was amended to address the complaints of motion picture exhibitors in the Alden-Rochelle case. Under the amended decree, which still substantially controls ASCAP's activities, the following restrictions were put on the operation of ASCAP's licensing system: ASCAP's licensing authority is not exclusive; both the user and the owner of a composition in ASCAP's repertory must request in writing that ASCAP grant a performance license for the composition; ASCAP may not insist on the blanket license, and the fee for

---

18. 546 F.Supp. at 287.

19. BMI v. CBS, 441 U.S. 1, 10 (1979) (citing complaint in United States v. ASCAP, Civ. No. 13-95 (S.D.N.Y. 1941), pp. 3-4).

20. United States v. ASCAP, 1940-43 Trade Cas. (CCH) ¶56,104 (S.D.N.Y. 1941).

21. U.S. v. BMI, 1940-43 Trade Cas. (CCH) ¶56,096 (E.D. Wis. 1941). However, BMI's later consent decree enjoined BMI from engaging in the commercial publication, recording, or distribution of music. U.S. v. BMI, 1966 Trade Cas. (CCH) ¶71,941 (S.D.N.Y. 1966).

the per program license, which is to be based on the revenues for the specific program licensed, must offer the user a genuine economic choice between the per program license and the blanket license; and, if ASCAP and a potential licensee are unable to agree on a fee within 60 days from the date of application, the applicant may apply to the District Court for the Southern District of New York for a determination of a reasonable fee, with ASCAP having the burden of proving reasonableness.[22] Similar restrictions were later placed on BMI.[23] Between 1951 and 1954, and again between 1964 and 1969, local television stations negotiated with ASCAP pursuant to the amended consent decree concerning the rates for the blanket and per program licenses.[24]

The amended consent decrees have repeatedly been challenged and sustained on antitrust grounds. The courts have twice construed ASCAP's 1950 amended decree not to require ASCAP to issue licenses for selected portions of its repertory (i.e., country music, jazz, etc.).[25] The legality of the blanket license was upheld in an infringement suit brought

---

22. United States v. ASCAP, 1950-51 Trade Cas. (CCH) ¶62,595 (S.D.N.Y. 1950).

23. The BMI decree does not specify that the district court may set the fee if the parties are unable to agree. However, courts have concluded in antitrust litigation that the practices of ASCAP and BMI are similar for antitrust purposes. See, e.g., CBS v. BMI, 441 U.S. 1, 12, n. 20 (1979).

24. See United States v. ASCAP (Application of Voice of Alabama, Inc.), Civ. No. 13-95 (S.D.N.Y. 1951); United States v. ASCAP (Application of Shenandoah Valley Broadcasting, Inc.), Civ. No. 13-95 (S.D.N.Y. July 28, 1969) (final order).

25. United States v. ASCAP (Application of Shenandoah Valley Broadcasting, Inc.), 208 F.Supp. 896 (S.D.N.Y. 1962), aff'd, 331 F.2d 117 (2d Cir. 1964), cert. den., 377 U.S. 997 (1964); United States v. ASCAP (Application of National Broadcasting Co.), 1971 Trade Cas. (CCH) ¶73,491 (S.D.N.Y. 1970). See also United States v. ASCAP (Motion of Metromedia, Inc.), 341 F.2d 1003 (2d Cir. 1965).

by ASCAP members against individual radio stations in which the stations argued that the blanket license constitutes illegal price fixing and ASCAP is a combination in restraint of trade.[26] The first direct challenge to the blanket license for the public performance of television music arose in Columbia Broadcasting System, Inc. v. ASCAP,[27] a case in which the CBS television network brought an antitrust action against ASCAP and BMI and their members and affiliates. In a landmark decision, the Supreme Court ultimately held the blanket license was not a *per se* violation of the antitrust laws, and the Second Circuit, after applying a rule of reason analysis, sustained the validity of the blanket license.

To better understand the factual issues that arise when investigating whether the blanket licenses are anticompetitive, and whether the present system of licensing television music fosters creativity in the public interest, it is useful to examine how the television industry operates today.

2. Use of Music By Television Networks and Local Television Stations. There are approximately 800 local television stations currently in operation. The three national television networks each own and operate several stations[28] in the top fifteen television markets in the United States and each has approximately 200 affiliated local stations.[29] Local

---

[26] K-91, Inc. v. Gershwin Publishing Corp., 372 F.2d 1 (9th Cir. 1967), *cert. den.*, 389 U.S. 1045 (1968).

[27] CBS v. ASCAP, *supra*, note 17.

[28] Each network presently owns between 4-8 stations. FCC regulations provide that no broadcast licensee may control more than 12 television stations or reach more than 25% of the national television market. 47 C.F.R. §73.3555(d) (1985).

[29] *See* Television Cable Fact Book, Cable & Services Vol., pp. 98, 102, 106 (1984).

television stations, whether network-affiliated or independent, have three principal sources of programming: network programming; syndicated programming; and locally-produced programming.[30] The rights to most network and syndicated programming, which make use of copyrighted soundtrack music, are purchased by the networks or the local stations from the independent television or motion picture production companies, known as "program packagers."[31]

Syndicated programming includes theatrical motion pictures, prerecorded television programs, and live programs offered by program packagers and distributors to be broadcast as non-network programs. Such programming might typically comprise 65-75 percent of the total non-network programming of local stations. The bulk of syndicated programming on all local stations is comprised of prerecorded programs previously broadcast on network television and of theatrical motion pictures. The remainder, about 35 percent, is produced specifically for syndication, and is known as first-run syndicated programming. Most local stations own inventories of syndicated programs to which they own the broadcast rights, just as the networks own inventories of programs, feature films, and commercials that they will rerun.[32]

Music is used in television programming in three principal ways: as theme, background, or feature music. Theme music is the music used to introduce and close a program. Background music is used to complement action on the screen. Feature music is music used as the focus of audience attention, such as a song sung by a performer on a variety show. While virtually all television programs make some use of music, the predominant portion of that music consists of background and theme music.[33] While the composition of background music often requires great expertise and may significantly contribute to the overall entertainment value of a program, such music is usually interchangeable.[34]

---

[30] Buffalo Broadcasting v. ASCAP, 546 F.Supp. at 279.

[31] Id. (syndicated programming); CBS v. ASCAP, 400 F.Supp. at 742 (network programming). However, a small percentage of network and syndicated programming was originally produced by the networks. 400 F.Supp. at 742.

[32] 546 F.Supp. at 279; 400 F.Supp. at 742, 775, 777.

Most locally-produced programs contain theme music, some contain background music, and a few contain feature music. Local stations have the ability to make specific decisions about which music to use in most of their locally-produced programs; they acquire the music from music production companies, music libraries, or background music services.[35] Local stations do not, however, have the ability to control the use of music (usually theme or background music) in locally-produced commercials, which is predominantly copyrighted music in the ASCAP/BMI repertory.[36]

Ordinarily, the music in network and syndicated entertainment serials is predominantly theme and background music.[37] The producers, who are engaged in a high-risk business,[38] usually obtain music for their programs by two means: (1) by engaging a composer-for-hire to write original music; and/or (2) by obtaining a license from a music publisher or its agent (usually the Harry Fox Agency) for the right to use pre-existing compositions.[39] The cost of obtaining the right to the music is usually 2 percent or less of the total production costs of a given program.[40]

---

[33] 546 F.Supp. at 281; 400 F.Supp. at 755.

[34] 546 F.Supp. at 281.

[35] Id.

[36] Id.

[37] 400 F.Supp. at 755.

[38] 546 F.Supp. at 282; with respect to the business of syndicated programming, there are hundreds of syndicators and thousands of syndicated programs available for purchase by local stations. Since a relatively small percentage of these programs have had network runs which demonstrate potential for the programs' popularity within a given market, syndicators do not know at the time of syndication which programs will be performed often. See 546 F.Supp. at 280.

Where a producer hires a composer to write music for a program, the production company generally owns the copyright in a work made-for-hire. The composer, who is usually a member of ASCAP or BMI, negotiates with the producer for an "up-front" fee for his/her services, on the understanding that the royalties from public performances other than in movie theatres will be divided equally between the composer and the music publisher. Since the producers often own publishing subsidiaries, the producer often insists, as part of the work-for-hire agreement, that its subsidiary must publish the music; thus, the composer will receive the writer's share of any performing rights royalties distributed by ASCAP or BMI, and the music publisher's share will frequently go to the producer's subsidiary or affiliate.[41]

The "up front" fee paid by the producers to the composer-for-hire is typically small, and may not cover the composer's expenses in producing a master recording of the score. The composer receives the bulk of his/her income from licensing the public performance right.[42]

---

39. 546 F.Supp. at 283; 400 F.Supp. at 756. The Harry Fox Agency is a clearinghouse for synchronization rights in copyrighted music. The agency represents virtually every major publisher in negotiations with program producers who wish to record copyrighted music on the soundtrack of a filmed or taped program. 400 F.Supp. at 760.

40. 546 F.Supp. at 283.

41. *Id.*

42. *See*, *e.g.*, L. Sobel, *A Movie and TV Producer's Guide to Acquiring*

The producer does not have as much control when licensing feature music. Such music has been previously composed and is frequently licensed by a publisher who is not connected with the program production company; the publisher might be represented by the Harry Fox Agency. In negotiations with the publisher, the producer will not obtain performing rights. The licensing of the synchronization rights in preexisting feature music is characterized by price competition.[43]

Because composers and music publishers retain the performing rights in most television music, program packagers and syndicators are unable to transfer the rights to networks or local television stations. These stations, therefore, must obtain licenses to avoid copyright infringement for publicly performing the protected music on television. Ordinarily the networks and local stations obtain blanket or per program licenses from ASCAP and BMI.

The fees payable by the networks and local stations to ASCAP and BMI do not vary according to the significance, quality, or value of any music in a particular program; moreover, fees do not vary according to the extent to which music in the ASCAP or BMI repertory is actually used if the blanket license is employed. The annual sum which network and local television stations pay for public performance licenses, though substantial, is but a small fraction of the stations' revenues.[44]

---

and Earning Income from Soundtrack Music, Part I, 7 Ent. L. Rptr. 3 (Oct. 1985).

[43] 546 F.Supp. at 284; 400 F.Supp. at 736.

[44] 546 F.Supp. at 282.

Television stations have become increasingly dissatisfied with the operation of blanket licensing under ASCAP's 1950 amended consent decree. Accordingly, in 1975 CBS brought a lawsuit claiming that ASCAP's licensing system for music performed on network television stations violates federal antitrust law.[45] Buffalo Broadcasting Co. and a class of owners of local television stations brought a similar suit in 1982 with respect to ASCAP's licensing system for music performed on local television stations.[46]

3. The CBS Litigation. In CBS v. ASCAP, CBS argued that ASCAP and BMI are unlawful monopolies and that the blanket license is illegal price fixing, an unlawful tying arrangement, a concerted refusal to deal, and misuse of copyright. The district court found that the practice did not fall within the *per se* rule[47] for proving a restraint of trade in violation of section 1 of the Sherman Act,[48] and held that the blanket license, judged by the rule of reason, is not an illegal restraint of trade.[49]

---

[45] CBS v. ASCAP, *supra*, note 17.

[46] Buffalo Broadcasting v. ASCAP, *supra*, note 2.

[47] The essential ingredient of an antitrust violation is the determination of whether a practice is in restraint of trade. This can be proved by one of two methods: the *per se* analysis or the rule of reason. Under the *per se* analysis, only concerted actions which unreasonably restrict competitive conditions violate section one; such actions are considered blatantly anticompetitive without redeeming quality, and are conclusively unreasonable, so the plaintiff's burden of proof is relatively low. For example, both horizontal and vertical price fixing agreements are *per se* illegal. William C. Holmes, Intellectual Property and Anti-trust Law §5-4 (1983). *See infra*, note 61 for a summary of the rule of reason.

[48] CBS v. ASCAP, 337 F.Supp. 394, 398 (S.D.N.Y. 1972).

[49] CBS v. ASCAP, 400 F.Supp. at 781-83.

The Second Circuit Court of Appeals reversed and held that the blanket license issued to television networks is a form of price fixing illegal *per se* under the Sherman Act.[50] The U.S. Supreme Court disagreed with the Second Circuit with respect to the *per se* illegality of the blanket license, and reversed its judgment and remanded the case for analysis of the antitrust claims under the rule of reason.[51]

The Supreme Court stressed that the intersection of antitrust and copyright conditions inherent in the licensing of performing rights in the music industry is unique, and examination of the licensing system thus deserves *sui generis* attention.[52] Beginning its *per se* analysis of the blanket license in this context, the Supreme Court noted that the Justice Department, representing the Federal Executive, and the Judiciary each carefully scrutinized ASCAP and its licensing practices under the 1950 consent decree. The Court thought these factors indicated that the license may have redeeming competitive virtues.[53] The Supreme Court also found that Congress, by creating compulsory blanket licenses for cable retransmissions, jukebox performances and performances by noncommercial broadcasters in the Copyright Act of 1976, found the blanket licensing mechanism to be economically beneficial in at least some circumstances.[54]

---

[50] *CBS v. ASCAP*, 562 F.2d at 140.

[51] *BMI v. ASCAP*, 441 U.S. at 24-25.

[52] *Id*. at 10.

[53] *Id*. at 13.

[54] *Id*. at 15-16.

The Court also reasoned that any market arrangements reasonably necessary to effectuate the performing rights granted under the Copyright Act should avoid illegality under the *per se* antitrust analysis.[55]

The Supreme Court found that the blanket license is not a "naked restraint of trade with no purpose except stifling competition" because the license achieves an efficient integration of sales, monitoring, and enforcement purposes.[56] Furthermore, the Court noted that the efficiencies achieved by the blanket license are beneficial to both sellers and buyers.[57] Though the blanket license creates a market in which individual composers are inherently unable to compete with full effectiveness,[58] it is unlikely to cause decreased output, and does offer monetary incentive for composers to create music that is demanded by consumers.[59] Finally, the Court indicated agreement with the district court's finding that direct licensing is available to music users as an alternative to blanket licensing.[60]

---

[55] *Id.* at 19.

[56] *Id.* at 20-21.

[57] *Id.* at 21.

[58] *Id.* at 23.

[59] The Court noted that because compositions can be simultaneously "consumed" by many users, composers have numerous markets and numerous incentives to produce; thus, the blanket license is unlikely to create decreased output. Since popular songs get an increased share of ASCAP's and BMI's revenue distributions, composers compete even within the blanket license in terms of productivity and customer satisfaction and, thus, composers have monetary incentive to create popular music. *Id.* at 22, n. 40.

[60] *Id.* at 24.

On remand, the Court of Appeals scrutinized ASCAP's blanket licensing practices under the rule of reason[61] analysis of antitrust violations.[62] In balancing the blanket license's competitive and anti-competitive effects, the Court pointed out that the absence of price competition among songs under the blanket license does not mean that the license is a restraint on potential competition.[63] This is so because if the opportunity to purchase performing rights to individual songs is fully available, then it is customer preference and not the license itself that causes the lack of price competition among musical compositions.

The Court found that CBS could not prove the restraining effect of the blanket license because it did not prove the non-availability of alternatives; to the contrary, the district court found that "if CBS were to seek direct licensing, 'copyright proprietors would wait at CBS' door.'"[64] The Court noted that CBS "cannot expect the antitrust laws to assure it that a changeover to direct licensing can be accomplished instantly or at no expense."[65]

---

[61] The rule of reason analysis, less rigorous than the *per se* rule, allows a legitimate business purpose to outweigh an indirect effect on competition to sustain the legality of a particular practice. The rule of reason allows a balancing of the following factors to determine competitive unreasonableness: (1) the nature of the challenged restraint -- size of the organization and importance of the market issues; (2) competitive effect and magnitude of the injury; (3) purpose of the restraint as a legitimate business purpose or solely to suppress competition. W. Holmes, *supra*, note 47, at 5-25, 5-27.

[62] *CBS v. ASCAP*, 620 F.2d 930 (2d Cir. 1980), *cert. den.*, 450 U.S. 970 (1981).

[63] 620 F.2d at 935.

[64] *Id.* at 938, *citing* 400 F.Supp. at 779.

[65] *Id.* at 957.

Though the legality of the blanket license was ultimately sustained with respect to music performed by network television stations, the blanket license received yet another challenge. In 1982, in Buffalo Broadcasting Co. v. ASCAP,[66] the District Court for the Southern District of New York again examined the legality of the blanket license, this time regarding music performed by local television stations.

4. The Buffalo Broadcasting Litigation. In Buffalo Broadcasting, a class of owners of local television stations argued that blanket licensing of performing rights to local television stations is a restraint of trade, because the system requires "the splitting of the licensing of television performing rights from the licensing of all other music rights at the source," which causes absence of price competition between and among musical compositions.[67] Using the Second Circuit's rule of reason inquiry from the CBS-remand case, the district court sought to determine whether the local television stations have any realistically available alternatives to blanket licensing and, if not, whether on balance the blanket licensing system's anticompetitive effects outweigh its procompetitive effects.[68]

The district court considered the possibilities of the program license, direct licensing, and source licensing, and concluded that local television stations lacked a realistically available alternative to the blanket license.[69] The district court concluded that the cost savings of

---

66. Buffalo Broadcasting v. ASCAP, supra, note 2.

67. 546 F.Supp. at 285.

68. Id. at 286.

69. Id. at 293.

the blanket license are insignificant for local stations and do not balance the anticompetitive consequences of the absence of price competition.[70] Thus, the court held the blanket license to be a restraint of trade.

On appeal, the Second Circuit agreed with the district court's method of inquiry and subsidiary factual findings, but rejected its legal conclusions concerning the availability of realistic alternatives to the blanket license,[71] and thus reversed the district court's holding.[72]

The Second Circuit found the per program license a limited alternative to the blanket license, as well as a realistic fall-back license that local stations can rely on if they attempt to obtain performing rights through direct or source licensing.

The Court concluded that local stations did not demonstrate that a brokering mechanism such as the Harry Fox Agency would not handle direct licensing transactions if the stations offered to pay royalties directly to copyright owners.[73]

With respect to source licensing, the appellate court rejected the district court's conclusion that source licensing is not a realistic alternative because syndicators have no motivation to depart from their standard practices. The Court suggested that despite the strong bargaining power of a syndicator of a highly successful program, the syndication market would not be unresponsive to "aggregate demand from stations willing to pay a reasonable price for source licensing of music performing rights."[74] The Court stressed that under the Copyright Act of 1976 composers have a right to license separately the public performance of their works.[75]

---

[70] Id. at 296.

[71] 744 F.2d at 926.

[72] Id. at 933.

[73] Id. at 928 - 29.

D. The Bargaining Power of Composers.

As was pointed out by the courts in the CBS and Buffalo Broadcasting litigation, most of the theme and background music utilized in the soundtracks of television programming is created by "composers-for-hire."[76] The economic rights of composers have fluctuated over the years as their union/non-union status has changed. The following discussion will indicate why composers, as employees-for-hire under the copyright law, nonetheless have an interest in the blanket license system that ensures continued payment to copyright owners for continued use of a protected work.

---

[74] *Id.* at 931.

[75] *Id.* at 932.

[76] The copyright for work done by composers ordinarily belongs to the producer under the "work for hire" doctrine, either because the composer is a staff employee or because he/she has signed a work for hire agreement.

A "work for hire" is--

> (1) a work prepared by an employee within the scope of his or her employment; or
>
> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work...

17 U.S.C. §101 (1976).

> (a) Initial Ownership.--Copyright in a work protected under this title vests initially in the authors of the work.
>
> (b) Works Made for Hire.--In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

Id. at §201.

In the early days of soundtrack filmmaking, composers, like screenwriters, received a salary for which they wrote music as required, and generally worked as members of the staff of the movie studios. The company, which directly supervised the composer's work, took all rights in the music.[77]

During the 1930's, the motion picture industry was unionized. In the early 1950's the Screen Writers Guild successfully negotiated contract provisions giving the writer control over part of the copyright. These provisions recognized the principle of "separation of rights" by which, for example, a writer could grant publication rights to one publisher and motion picture rights to a different company.[78] However, the composers did not form a guild until 1954, when the Composers and Lyricists Guild of America (CLGA) was established.[79]

The CLGA was granted bargaining union status by the National Labor Relations Board in 1955. The first agreement between the CLGA and the Association of Motion Picture and Television Producers (AMPTP) was concluded in 1960. It established minimum fees, work benefits and other forms of compensation for film and television composers. Even after unionization, the industry practice of producers taking complete ownership

---

77. F. Hawlicek and J.C. Kelso, The Rights of Composers and Lyricists: Before and After Bernstein, 8 Colum.-VLA Art & the Law 439, 444 (1984).

78. Id. at 444, n. 28, 445. See also H. Lovell & T. Carter, Collective Bargaining in the Motion Picture Industry 9, Institute of Industrial Relations - Univ. of Calif., Berkeley (1955).

79. See Hawlicek and Kelso, supra, note 77, at 445.

of the copyright in music remained in effect.[80] However, the CLGA achieved an important gain for composers by negotiating a provision in the standard agreement that the producer will transfer ownership of performance rights in the music made for hire to the composer and/or music publisher.[81] ASCAP and BMI were to administer the collection and distribution of performance royalties.

Composers continued to negotiate through the CLGA to achieve partial ownership of copyright in their works. After a breakdown in negotiations for a new minimum agreement in 1971-1972, composers went on strike. When the strike proved ineffective,[82] composers turned to the courts. They brought a class action antitrust suit against the sixteen largest television and film production companies in Bernstein v. Universal Pictures, Inc.[83]

In the Bernstein litigation, composers argued that the standard terms contained in their labor agreement constituted a restraint of trade because they had the effect of depriving the composers of all rights in their works. They could only win their case by asserting that they were in fact independent contractors, and that the labor agreement was not subject to the labor union exemption to the antitrust laws.[84] For litigation

---

80. Id.

81. See 744 F.2d at 930.

82. The strike was ineffective both because composers had limited financial means and because the producers had no pressing need for their services. The producers owned an enormous inventory of music that the composers had already written, which enabled them to continue film and television program production without the services of the composers.

83. 379 F.Supp. 933 (S.D.N.Y. 1974), rev'd, 517 F.2d 976 (2d Cir. 1975).

84. Hawlicek and Kelso, supra, note 77, at 442-3. For a brief history of the litigation see id. at 448, n. 43.

purposes, the composers demonstrated that they no longer worked on the staffs and on the physical premises of the television and film studios, that they provided their own supplies and equipment, and that they worked without direct supervision from the producers. The composers submitted affidavits attesting that they were not "employees" under labor law.

The Bernstein case was settled in 1979.[85] Though composers won the right to exploit their future works in markets outside film and television,[86] it later became evident that they lost their right under labor law to union representation. Motion picture and television producers in 1979 refused to bargain with the CLGA, and now refuse to bargain with the new Society of Composers and Lyricists.[87] The National Labor Relations Board's Regional Director ruled in 1985 that film and television composers are not eligible to be represented by a formal union, because they are independent contractors and not employees.[88] If S. 698 is enacted, the composers' lack of union status will affect their bargaining power in any subsequent negotiations with producers.

E. Availability of Residuals for Other Motion Picture Contributors.

The circumstances of composers and songwriters with respect to motion pictures differ markedly from other contributors to motion pictures, such as performers, writers, directors, and producers. These latter groups receive residual payments as a result of collective bargaining agreements.

---

[85] Bernstein v. Universal Pictures, Inc., 72 Civ. 542-CLB (Apr. 10, 1979) (Brieant, J.) (Memorandum and Order Confirming Settlement).

[86] For a description of the specific terms of the settlement see Hawlicek and Kelso, supra, note 77, at 449-454.

[87] See Sobel, supra, note 42, at 5.

[88] Id.

Residuals have been characterized as "extra compensation for services rendered by the recipients in the course of employment, in addition to their basic wages, salaries, or fees."[89] Basically, the term denotes additional compensation for later uses -- a means of providing for re-use payments.[90]

Residuals are often grouped with subsidiary rights. Both terms refer to something that is left over or remains after something else has been contracted for.[91] One commentator notes that the basic distinction between subsidiary rights and residuals is that

> Subsidiary rights are additional rights presently granted, whose exploitation in the same or other media as the granted basic right hopefully will result in additional compensation, whereas residuals do not add any present rights, but are merely rights to receive payments for subsequent uses of past rights granted or past services rendered.[92]

In other words one term covers additional rights; the other refers to additional compensation for past service or rights.

1. Origin of residual payments.

Apparently the term, "residual rights" was adopted by representatives of talent guilds[93] who administer collective bargaining agreements.[94] Residual payments are based upon "the idea that the talent employee[95] should, as a matter of fairness, receive additional compensation for additional uses of the results of his services."[96] A leading commentator observed:

---

[89] Gilbert, Residual Rights Established by Collective Bargaining in Television and Radio, 23 (LAW & CONTEMP. PROBS. 102, 103 (1958) (emphasis supplied).

[90] Taubman, Subsidiary Rights and Residuals: Definitions in Subsidiary Rights and Residuals 5, 7 (Taubman ed. 1968).

[91] Id. at 5.

[92] Id. at 8 (emphasis supplied).

[93] The phrase "talent guilds" is used by Gilbert, the leading commentator, to cover independent guilds (Writers Guild of America, East; Writers Guild of America, West; Screen Directors Guild); AFL-CIO guilds (Screen Actors Guild; Radio and Television Directors Guild); and an AFL-CIO talent union (American Federation of Television and Radio Artists). Gilbert, supra note 89, at note 3.

> Various talent guild agreements[97] governing the use of recorded or filmed material in radio and television normally permit an initial use or cycle of uses in return for basic wages, salaries, or fees by participating talent employees, but call for additional compensation as a condition precedent to subsequent re-use or successive broadcasts or telecasts.[98]

It can be said, therefore, that residual payments cover performances that were not foreseen at the time the employment contract was entered. The problem of how to compensate talent employees for new and unforeseen uses of their work became quite evident with the advent of television. Old movies quickly became a mainstay of television programming. Everyone appeared to profit from this change -- the public, the television station, the owner of the motion picture -- except the performer or talent employee.

Although it seemed inequitable not to compensate the very employees whose work gave a particular film its monetary worth, courts were reluctant to order compensation since performers had no property rights in a film. Two early cases reveal the dilemma the courts faced: Roy Rogers and Gene Autry, two popular stars of western movies, sued the motion picture company and television licensing service to enjoin the defendants from distributing or licensing the exhibition of motion pictures in which the actor appeared on television. In one case the district court entered a judgment for the actor, and the defendants appealed;[99] in the other case, the same court entered a judgment for the defendants, and the actor appealed.[100]

---

[94] *Id*. at 1.

[95] As used in this statement, a talent employee is an individual who works in the entertainment business and belongs to one of the talent guilds.

[96] Gilbert, *supra* note 89, at 118.

[97] *See* pages 28-32 *infra* for a more detailed discussion of these agreements.

[98] Gilbert, *supra* note 89, at 102 (emphasis added).

Neither actor sought to enjoin the exhibition of his films on television on a theory that he had a property right in the film. The district court found that Roy Rogers had carefully built his image and had only granted the motion picture company limited commercial advertising rights which had expired upon the termination of his last agreement with them, and it granted plaintiff the injunction he sought.[101]

On appeal, the Ninth Circuit reversed. It distinguished between language in the contract that referred to the activities of the artist in connection with the motion pictures involved, "activities, poses, plays and appearances" and language that referred to non-motion picture reproduction of characteristics of the artist which are themselves valuable because of the notoriety of the artist and his great public following, "name, voice and likeness." The Ninth Circuit also found that Rogers had been fully paid for his work in the films and had specifically relinquished "all rights of every kind and character whatsoever in and to the same ... perpetually."[102]

---

[99] Rogers v. Republic Productions, 104 F.Supp. 328 (S.D. Ca. 1952), *rev'd* Republic Pictures Corp. v. Rogers, 213 F.2d 662 (9th Cir. 1954), *cert. denied*, 348 U.S. 858 (1954).

[100] Autry v. Republic Productions, 104 F.Supp. 918 (S.D. Ca. 1952), *modified & aff'd*, 213 F.2d 667 (9th Cir. 1954).

[101] Rogers v. Republic Productions, 104 F.Supp. 328 (S.D. Ca. 1952).

Gene Autry claimed that the showing of his films on sponsored television would constitute commercial advertising and violate his contract with the motion picture company. Several months after its opinion in the Rogers case, the district court found that Autry had relinquished all rights in the film and that there was no restriction upon their exhibition.[103] The decision was essentially upheld on appeal.[104]

These early decisions emphasized that without a proprietary interest the talent employee had little chance of suppressing exhibition of his/her films on television or of obtaining compensation for such exhibition. As Taubman observed, the cases were

> tantamount to negation of any property rights of performers in their performances, even if there were such rights, because they have effectively granted such rights to the film producer production company by contract so that attacks upon such uses under various theories fail to stand up.[105]

As one commentator correctly pointed out, having the issue resolved through collective bargaining agreements at least clarifies that it is a purely economic issue that presents two questions:

1. Should the performer represented by the particular talent guild receive additional compensation in the form of residual or re-use payments for services rendered in one medium for re-use of the same fruits and proceeds of such services in the same or another medium?

---

[102] 213 F.2d 662, 666.

[103] Autry v. Republic Productions, 104 F.Supp. 918 (S.D. Ca. 1952).

[104] 213 F.2d 667, 669.

[105] Taubman, PERFORMING ARTS MANAGEMENT AND LAW §18.3 at 619 (1972). See also Gilbert, supra note 89, at 117.

2. If so, how much, i.e., under what formula, for compensation?[106]

2. Contractual Solution

Since the performer has no property right in the film and courts have been reluctant to impose restrictions on the basis of unfair competition or contract interpretation, there appeared to be no way to get payments for additional uses except through specific provisions in future contracts. A system had already developed between the so-called talent guilds[107] and producers, purchasers, and users. This was a system wherein the guild or collective bargaining unit[108] negotiated with management to produce a standard employment contract that would protect the talent employees within a particular guild. Except for the star performers, the individual performer did not have sufficient clout to get the best terms; therefore, the talent employee looked to his or her guild to come up with a minimum contract to protect his or her interests or to carve out a special position. Since guilds represent both those employees who are well known and well paid and those who are barely known and given a minimum salary, collective bargaining contracts simply place a floor upon compensation or rights. Each employee is then free to negotiate better terms but generally may not waive any rights without the consent of the guild.[109]

---

[106] Taubman, *supra* note 105, §18.3 at 621.

[107] *See* note 93 *supra*.

[108] Collective bargaining units began in radio during the thirties and expanded rapidly during 1940-1950. Tower, *Labor Relations in the Broadcasting Industry*, 23 LAW & CONTEMP. PROBS. 62, 70 (1958).

[109] *See* Gilbert, *supra* note 89, at 116; Taubman, *PERFORMING ARTS MANAGEMENT AND LAW* §18.3 (1972).

At the time licensing of movies for exhibition on television began to increase, talent guilds tried to get compensation for their members by means of the collective bargaining agreement. In 1948 the Screen Actors Guild (SAG) entered into a collective bargaining agreement with the major motion picture producers that contained a stop-gap provision that provided that SAG

> could cancel its basic collective bargaining agreement with any producer, upon sixty days' written notice, if such producer televised or licensed the television (sic) of any new motion pictures released between August 1, 1948, and May 31, 1958, except (1) motion pictures made exclusively for "free television," where no charge is directly paid by the viewing audience; (2) motion pictures televised in theatres or other places where admission is charged; and (3) motion pictures televised as newsreel or trailers.[110]

A stop-gap provision had already been negotiated by the American Federation of Musicians in 1946 [111] and was soon negotiated by other guilds. Later those provisions were carried forward and codified in the Basic Agreements.[112] Thus, talent guilds were able to acquire some protection of residual rights that the individual employee might not have been able to get even if wary enough to ask for such protection subsequent to the Rogers and Autry decisions.

---

[110] Gilbert, supra note 89, at 117-118 (emphasis added).

[111] Between 1952 and 1955 a form of re-use payments was made to employee musicians on a sliding scale; after 1955 all payments for use of theatrical motion pictures or television were contributed to the AFM Music Performance Trust Funds for presenting "live" concerts, and the "re-use payments" were discontinued.

[112] Id. at 118.

Following these early negotiations, certain talent guilds succeeded in getting residual coverage in every subsequent basic agreement. The term residual rights was not a legal term of art originally,[113] however, and it may not appear as such in either the basic agreement or the individual contract between the employer and the talent employee.[114]

D. Extent of Coverage

As could be expected the greater the clout of the talent guild, the quicker it was able to acquire a provision covering residual rights. By 1958 actors, writers, and directors were guaranteed residual payments through the basic agreement with producers negotiated for members by their respective guilds.[115] Third parties may assume the obligations of residual rights established by the bargaining agreement, and they may secure the benefits. Based on a chose of action theory[116] the individual employee has a right to sue if entitled to residuals and not paid. In order to assume the producer's obligation to pay residuals, the third party has to assent.[117]

---

113. See Taubman, supra note 90, at 5.

114. Other terms include "fringe benefits" or "motion pictures and allied rights." Id. at 6. Residual payments may be included in the contract by reference to compensation for reruns. See, e.g., Alliance of Motion Pictures and Television Producers (hereafter "AMPTP") and Directors Guild Association, Basic Agreement of 1984, Art. 11-101.

115. Gilbert, supra note 89, at 102.

116. Id. at 112-113. See Atkinson v. Superior Court, 49 Cal. 339, 310 P.2d 960 (1957).

117. Id. at 113.

The basic agreement spells out how determination of eligibility for residual entitlement is established. The usual method of determination is based upon the employee receiving some form of credit for his or her contribution to the project. Thus, obtaining credit for a movie work has more significance than just obtaining recognition.118/

Although it is possible for a well-known talent employee to negotiate with an employer directly and get better terms than those mandated in the collective bargaining agreement, the basic agreement provides a "floor" that ensures that every employee who falls under the agreement's umbrella is given at least minimum protection.119/ The individual employee is still free to negotiate for better terms or even different terms. For example, talent agreements allow advance payments for residuals at any time before re-use if the individual employee expressly agrees to such an arrangement in his or her contract.120/ But the

---

118. Selz and Simensky, 1 ENTERTAINMENT LAW, §9.11 at 9-22 (1986).

119. For example, Article 9 of the Writers Guild of America 1981 Theatrical and Television Basic Agreement spells this guarantee out:

> The terms of this Basic Agreement are minimum terms; nothing herein contained shall prevent any writer from negotiating and contracting with any Company for better terms for the benefit of such writer than are here provided, excepting only credits for screen authorship, which may be given only pursuant to the terms and in the manner prescribed in Article 8. The Guild only shall have the right to waive any of the provisions of this Basic Agreement on behalf of or with respect to any individual writer.

120. Some employees gamble that advance payments will be more beneficial. For example, Jean Stapleton gave up her residual rights in All in the Family when she signed an "up-front buyout" contract when the show began. Now she receives no compensation when the very popular show is re-run. Erstein, "Stapleton Living with Edith," The Washington Times, February 4, 1987, 1B, 2B.

individual employee may not effectively waive the benefits of residual rights without the express consent of the guild that negotiated his or her basic agreement.[121]

The most prominent residual areas include: repeat, rerun, foreign distribution, domestic syndication, merchandising, non-theatrical distribution, theatrical distribution, theatrical motion picture, and "spin-off" fees.[122] Other residual areas may be recognized in the future.

Today, the guilds distribute large amounts of money through the residual systems. The Screen Actors Guild, for example, has been collecting residuals for 35 years, and by 1987 had distributed over a billion dollars to its members.[123] During fiscal year 1987, the same guild distributed more than $138 million to its members.[124] In August the Writers Guild of America reported that its members had earned $32,209,742 in residuals so far this year.[125]

Hostility between the guilds and motion picture companies over residuals is common. Issues relating to residuals have produced strikes,[126] and assertions that a motion picture company is not meeting its residual obligations appear frequently in the trade press.[127] Recently, motion picture companies have demanded roll-back on some residual obligations.[128]

---

[121] Gilbert, supra note 89, at 116.

[122] Sullivan, The Residual Target in SUBSIDIARY RIGHTS AND RESIDUALS 91, 93-95.

[123] Robb, "Screen Actors Guild Tops $1 Billion Residuals Mark," Daily Variety 1, 16 (April 2, 1987).

[124] Robb, "Peak $138.3 Mil Posted by Guild," Daily Vairety 1 (Oct. 13, 1987).

[125] "Writers Guild Residuals Show 6.3% Increase for Year to Date," Daily Variety 1, 21 (August 13, 1987).

[126] Field, "Resolution of Pay TV Issue Seen as Major Breakthrough," Hollywood Rep. 1, 14 (September 18, 1980).

It seems clear that in most cases residual rights can be effectively obtained, maintained, and enforced only through collective bargaining.

II. THE PROPOSED SOURCE LICENSING LEGISLATION

A. Purpose of the legislation.

Although local television broadcasters have long tried to get courts to rule against blanket licensing (the prevalent system of licensing music performance rights), the source licensing bills mark the first attempt to change this system by legislation.[129] S. 698 specifically responds to local broadcasters' complaints; it is designed to change the licensing of these rights by amending the Copyright Act to prohibit the conveyance of the right to perform publicly syndicated television programs without conveying the right to perform any accompanying music.

The source licensing bills are grounded on the premise that source licensing is not now realistically available to local broadcasters despite the contrary finding of the Second Circuit in Buffalo Broadcasting

---

[127] Robb, "SAG Claims Cannon Resids Default," Daily Variety 1, 42 (July 17, 1987).

[128] Robb, "Schaffner: DGA Can't Yield to 'Piracy' of Studios, Networks," Daily Variety 1, 12 (June 9, 1987).

[129] The source licensing bill was originally introduced in the 99th Congress. S. 1980, 99th Cong. 1st Sess. (1985). S. 698 is similar to the original proposal, but adds a provision that attempts to assure a residual interest to composers.

Company v. American Society of Composers, Authors and Publishers.[131] Senator Thurmond characterized the issue as "one of fairness. Local television stations have almost no bargaining power as they seek to purchase the right to broadcast the music on a prescribed soundtrack."[132]

B. Major Provisions.

S. 698 proposes to amend title 17 of the United States Code by adding a new section 113 and renumbering existing section 113 through 118.

1. Prohibition of transfer of performance right without the right to perform the accompanying music. The proposed new section 113(a) states:

> ... no owner, assignee, or licensee of a copyrighted audiovisual work may convey the right to perform publicly such work by non-network commercial television broadcast without simultaneously conveying the right to perform in synchronization any copyrighted music which accompanies such audiovisual works.

The proposed subsection requires all syndicators who license programs to nonnetwork commercial television stations to simultaneously convey the right to perform the copyrighted music on the soundtrack of these programs, at the time they convey other rights in the programs. As discussed in Part I of this statement, the program producers do not necessarily own the right to perform nondramatic music publicly; that right is ordinarily held by a music publisher, who may or may not be a subsidiary of the program producer.

---

[131] 744 F.2d 917, 929-932 (1984).

[132] Cong. Rec. S. 3928 (daily ed. March 10, 1987).

This proposed prohibition of the conveyance of one right without the conveyance of another would be unique in copyright law; it goes against the concept of the divisibility of copyright, explicitly recognized in the 1976 Act. Section 106 of the 1976 Act sets out the exclusive rights enjoyed by the copyright owner and §201(d)(2) recognizes divisibility:

> Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

The House Committee Report emphasized that this provision means "that any of the exclusive rights that go to make up a copyright, including those enumerated in section 106 and any subdivision of them can be transferred and owned separately."[133]

Although the proposed new "limitation" on the exclusive rights enjoyed by a copyright owner begins with the same provision found in existing limitations,[134] the proposed "limitation" is different in that it represents a prohibition on a grant of rights in contrast with existing limitations which partially affect the exercise of rights, generally in narrow terms. S. 698 would require the syndicators to license all rights at the same time. Consequently, the syndicator has to acquire the performance rights in all music that accompanies the program to be syndicated before the syndicator can license the program for local broadcasters.

---

133. S. Rep. No. 473, 94th Cong., 1st Sess. 107 (1975).

134. "Notwithstanding the provisions of section 106 . . ."

Although some syndicators may already control both rights, others will either have to acquire the performance right or remove the music from the program.[135] Before enacting this requirement, Congress should consider what the effect will be on the exclusive rights set out in §106 and the divisibility concept found in §201(d)(2).

2. Definition of audiovisual work. Proposed subsection (b) defines "audiovisual work" for purposes of the new §112A as "any motion picture, prerecorded television program, or commercial advertisement." This definition effectively covers all kinds of prerecorded programs that might contain accompanying music. If the source licensing legislation passes, local broadcasters will apparently only need to go to the collecting societies to license performance rights for live performances or programs they produce locally.

3. Composer's right to compensation - "Residuals". The bill would add proposed subsection (f) to section 201 of title 17 which is intended to promote the establishment of a residual system for compensation of composers similar to the residuals enjoyed by certain other creative contributors to motion pictures. Authors of synchronized musical works embodied in televised audiovisual works would be entitled in principle to an "interest" in the compensation paid the copyright owner of the motion picture licensed for television. The amount of the "interest" is to be determined by negotiations. In the case of a work made for hire, employees would be treated as authors for the purposes of proposed subsection (f).

---

[135] Music is apparently being stripped now from some movies before they are put on music video formats.

This residual interest is a major addition to the source licensing bill, and was not present in the original bill introduced in the 99th Congress.[136] It is intended to insure that composers and songwriters receive some compensation for the continued use of their material in televised audiovisual works. The section relies on the negotiating ability of individual composers and songwriters to secure these rights of compensation.

Contributors such as performers, writers, directors, and producers often receive residual payments from motion picture companies for the broadcast of motion pictures they helped create.[137] These residual payments, however, have been the result of collective bargaining agreements over a period of thirty years or more. Composers and songwriters have been denied the benefits of unions by events and their own litigating strategies. Therefore, it appears doubtful that a residual compensation system would readily be applied to composers and songwriters.[138]

4. Retroactivity. Section 5 of S. 698 provides that the amendments shall be effective on the date of enactment. it purports to grant a one year transition or grace period to the program producers with respect to any contracts covering public performance rights that were

---

136. S. 1980, 99th Cong., 1st Sess. (1985).

137. *See* text pp. 23-32, *supra*,

138. The source licensing bill in the House, H.R. 1195, 100th Cong., 1st Sess. (1987), contains an additional provision defining composers and songwriters as employees for purposes of collective bargaining. This provision would seemingly remove some of the impediments for establishing a residual system. However, even if composers and songwriters could unionize, there is no assurance they would be able to reach an equitable agreement with motion picture companies. Since motion picture companies oppose changing the present blanket licensing system, there is little motivation for them to cooperate in a change shifting responsibility for compensating composers and songwriters to themselves.

executed prior to the date of enactment. If the source licensing provision is intended to affect pre-existing contracts once the grace period passes, it is doubtful that the language of proposed §113(a), which seems to affect only _future_ conveyances, is consistent.

The bill presents two separate retroactivity issues. The first concerns the intended effect on preexisting contracts. The second concerns the huge inventory of movies and television programs, which the bill clearly impacts at least with respect to future conveyances.

Contracts now covering syndicated programs may run from three to seven years on the average, and sometimes longer, but the transition period provided in S. 698 is for only one year. If the bill retroactively affects existing contracts, this grace period is clearly not sufficient as a transition to a new licensing system.

In principle, Congress tends to avoid retroactive legislation since it involves a high risk of being unfair.[139] Furthermore, through the Fifth Amendment, Congress is prohibited from passing laws that impair the obligation of contracts.[140] There does not appear to be any overriding reason to invalidate the private contracts that are not protected by the proposed one year grace period. Consequently, if Congress chooses to enact S. 698, it might want to make clear that the legislation does not affect existing contracts. It should also consider making the legislation apply only to movies, television programs, and commercials created in the future. The disadvantage to making the legislation prospective is that the blanket license might remain the preferred mechanism to pay for the performance right for preexisting programs.

---

139. 2 SUTHERLAND, STATUTORY CONSTRUCTION §41.02 (4th ed. 1973).

140. _Id._ at §41.03.

III. CONSIDERATION OF THE ARGUMENTS FOR AND AGAINST SOURCE LICENSING

A. Open marketplace criteria.

Proponents of S. 698 urge that source licensing will improve marketplace conditions for the licensing of music performing rights by preventing the abuse of the monopolistic powers that broadcasters claim the licensing societies now exert. Proponents allege that local broadcasters have almost no bargaining power under the existing system since the rights in question are controlled by two giants[141] and local broadcasters cannot negotiate at arms length with such superpowers. Furthermore they praise S. 698 as providing the leverage by which local broadcasters can negotiate for the rights they use instead of being forced to purchase a blanket license that covers all available works.

Opponents respond that the marketplace is already open, that the courts have already found broadcasters' complaints to be on balance, unpersuasive, and have held that blanket licenses do not violate antitrust laws.[142] Proponents answer that S. 698 corrects the court's "faulty" reasoning by amending the 1976 Copyright Act to make it clear that Congress will not tolerate the use of copyright to justify anticompetitive behavior.

The Subcommittee should consider two other points in evaluating the condition of the marketplace issue: assessment of bargaining power, and availability of choices.

1. Assessment of bargaining power. Broadcasters have complained that they have no bargaining power. Opponents point to the fact that the fee has been periodically negotiated and the rate has gone down steadily

---

[141] ASCAP and BMI are said to control the rights to 95% of all of the music in syndicated programs.

[142] *See* text pp. 14-20, *supra*.

since 1949 as proof that local broadcasters have potent bargaining power and that Congress need not act to change this balance. Opponents also point out that broadcast stations are profitable, influential entities, and, since they, through the All-Industry T.V. Music License Committee, bargain collectively as an industry with the performing rights societies, their bargaining power is at least equal, if not superior. Although the parties seem to disagree on who has superior bargaining power, both sides agree that the fee has gone down consistently.143/

2. Availability of choices. Proponents contend that they are forced to use blanket licensing. The music is already recorded in the syndicated programs, which are for all intents and purposes unusable without a music performing license. Broadcasters have no choice but to obtain the only license realistically offered to them -- the blanket license. Opponents retort that four choices are now available for the licensing of music performance rights: blanket licensing, per program licensing, direct licensing, and source licensing. Opponents of S.698 claim that source licensing will be anticompetitive in that it will eliminate all methods of licensing music performance rights except source licensing, that it mandates only one way of doing business -- government regulation at its ham-handed worst.

It is not clear whether "choices" can be made under either the current system or the proposed legislation. The current system favors blanket licensing through custom and practice; the bill mandates source licensing. Recent court decisions suggest that the blanket license is used because it is the customer's, i.e., the broadcaster's, preference.

---

143. Opponents claim the rate has decreased from 2.5% in 1949 to 1.15% today.

B. Fairness And/Or Effectiveness of System.

1. Reasonableness of Fee. Supporters of S. 698 insist that the price of the blanket license has no relationship to the amount or quality of the music a local station actually uses. They argue that the blanket license system is not a reasonable or logical fee arrangement since it forces broadcasters to pay for all available music instead of the music they actually use. Furthermore, they claim that source licensing of music performance rights would provide a fairer -- in many instances, a higher -- price for the music actually used.

Those opposed to the bill insist that the blanket license fee is on balance reasonable, that unlimited access to the licensing society's complete repertoire minimizes transaction costs and is convenient for both user and copyright owner, that the rate has periodically been renegotiated and adjusted downward, and that the fee is subject to judicial review under an established rate review procedure by an expert court. Proponents retort that the rate review procedures are torturous and cumbersome, and consequently those who challenge the rates are pressured to settle. They say no rate review judge has ever reached a final decision.

2. Intended Beneficiaries. Proponents of S. 698 insist that the blanket licensing system does not reward the individual creators of music but permits double payments to program producers who have music publisher subsidiaries, and the producers and their subsidiaries are the primary beneficiaries of the system. Since the publisher-subsidiaries are members of the licensing societies, the producers through their subsidiaries receive one-half of the distributed performance rights royalties.

Proponents also note that there is no reason why future contracts cannot provide that individual composers receive a share (i.e., residuals) of the direct payments to the studios for any music subject to source licensing.

On the other side opponents insist that passage of the bill will have a devastating effect on both publishers and individual composers. They contend that source licensing destroys the composer's right to continued payment for continued performance while the blanket licensing system is based on the continued payment of royalties to composers. Therefore, they argue that source licensing will deprive composers of deserved income. Opponents assert that there is no valid marketplace value for music before performance (and hence producers will generally not be willing to pay increased money up-front to composers); that if producers were willing to consider deferred or residual payments to composers, producers will be unable to get a better price for their programs based on the cost of the music because the television station will be in the "driver's seat" in any negotiations constrained by statute to one method of licensing; and that source licensing will mean that unknown composers will receive a low one time payment regardless of the later popularity of their music. They will not share the success monetarily.

Proponents point to the residual systems operating to compensate other contributors to motion pictures, such as performers, writers, and directors, as representative of a better system. There is no reason, they contend, why a similar system could not be established for the benefit of composers.

Opponents counter that all residual systems have been established through collective bargaining between the crafts unions and motion picture producers. Composers and songwriter organizations have lost union status under the labor laws.[144] For this reason, opponents contend that emergence of residual payments under a scheme mandated by S. 698 is not realistic for the forseeable future.

The likelihood of establishing a residual system would be enhanced by making composers and songwriters eligible for collective bargaining under the labor laws.[145] Even if such a scheme were adopted, however, there is no certainty a union representing composers could reach an equitable agreement with motion picture producers. Historically, residual systems have only resulted after hard bargaining by artists' craft unions and the current payment levels have taken 30 years or more to be attained. Even if Congress granted composers the right to bargain collectively, the statute could not guarantee that the parties would successfully reach an agreement. Therefore, S. 698 would cut off composer's existing rights to continued payments for continued performance without guaranteeing them a better initial or residual payment.

Opponents also question whether the existing residual systems are any less contentious than the blanket licensing systems. The crafts unions have called several labor strikes to force concessions from the motion picture producers and both groups have frequently been at odds over the operation of the residual systems.[146] An objective comparison of blanket licensing with residual systems leads to the conclusion that under both systems, hostility may break out.

---

[144] See text pp. 20-23, supra.

[145] The source licensing bill in the House, H.R. 1195, 100th Cong., 1st Sess. (1987), contains a provision recognizing film/TV composers as employees for purposes of the labor laws.

[146] Allegations that motion picture companies underpay their residual obligations are frequent features in the trade press. See Barrett, Unpaid Residual Claims Still Under AFTRA Study, Hollywood rep. 6 (April 7, 1976); Field, Resolution of Pay TV Issue Seen as Major Breakthrough, Hollywood Rep. 1, 14 (September 18, 1980); Robb, SAG Claims Cannon Resids Default, Daily Variety 1, 42, (July 17, 1987).

3. Distinction Between Motion Picture Theatres and Television Stations. Local broadcasters say they seek the same treatment as motion picture theatre owners who pay one rental fee to cover all of the rights of the studio in the movie, including the music performance right. Opponents respond that there are legitimate reasons to treat television stations differently. They note that theatrical exhibitors pay a rental based on every performance of the movie and that they now pay a much higher fee for the combined synchronization and performance rights than broadcasters pay for the synchronization right.[147] Furthermore, they argue that S. 698 will force the program-producers to acquire rights they do not need. Consequently, these producers will not be as willing to license the synchronization right for as little as they do now.[148] Opponents also point to the substantial difference in production lead-time: film production extends over months or years, whereas many TV programs are produced within a few days of broadcasting, or the same day as they are broadcast. This factor clearly makes clearance of rights more difficult for TV programs. Finally, opponents argue that the court-mandated source licensing of music for theatrical exhibition of films occurred when ASCAP was less rigorously regulated than now, and they contend that this source licensing is an anomaly in the entire world of copyright -- in every other

---

[147] Sobel notes that the synchronization right may sell for only $50 to $500 per composition while the synchronization and performance rights for theatrical motion picture exhibition may cost $750 to $20,000 per composition, The Music Business and the Sherman Act: an analysis of the "Economic Realities" of Blanket Licensing, 3 Loyola Ent. L.J. 1, 48 (1983).

[148] Id.

country with an advanced copyright regime, copyright owners of music receive fees for theatrical exhibitions from theatre owners. This difference in motion picture licensing practices has already presented negotiating problems for U.S. performing rights societies, opponents contend. Foreign societies have been reluctant to pay U.S. societies a full share of the royalties from theatrical exhibition abroad. If S. 698 passes, the negotiating position vis-à-vis foreign societies may be substantially undermined. U.S. copyright owners generally do not have a fixed right to obtain all royalties flowing from performance of their music abroad; what our copyright owners receive depends greatly upon the reciprocal agreements negotiated between U.S. and foreign societies. Reciprocity is the key word.

4. Stability of Marketplace. Opponents of the source licensing legislation maintain that the present system provides a relatively simple and efficient way to license music performing rights and that this system is working well. They urge that S. 698 will cause chaos: it will upset existing contracts, disrupt a long-standing and efficient system, and reduce the income of thousands of composers. They note that costs to initiate a new system will be large and enforcement of rights under a new system will be difficult.

Opponents of S. 698 claim that its passage will harm the entire blanket licensing system. This harm may occur on either the domestic or international level. On the domestic level, it is clear that if local broadcasters succeed, networks and pay television will also want source licensing. If they in turn succeed, the performing rights societies will be much weaker than they now are.

Local broadcasters counter that the system is not working well and that indeed they have fought the existing system for thirty years. They argue that it will be no more difficult to negotiate for and clear the music performance rights in advance than any other copyrights involved in the program. Moreover, they insist that only a small percentage of composers will have to do business differently since the majority of royalties for blanket licenses of television music go to a relatively small percent of ASCAP or BMI members.

IV. COPYRIGHT OFFICE CONCLUSIONS

Enacting source licensing by legislative fiat is not necessarily the best solution to the long-standing dispute over performance rights between the producers of syndicated programs and performing rights societies on the one hand, and those who purchase these programs for local broadcast on the other. Proponents of S. 698 may be right when they say that they cannot realistically achieve source licensing at this time. The broadcasters and ASCAP have made a serious effort to negotiate new per program and blanket license rates, but unfortunately these efforts have recently ended in failure.

The Copyright Office sympathizes with the broadcasters' contention that they bargain at a disadvantage with a monopoly to obtain licenses for music already fixed in the soundtracks of programs they have purchased. On balance, hoever, the Office is persuaded that legislation mandating only source licensing tilts too far in favor of broadcasters. It would be a greater unfairness to deprive composers of the right to collective administration and enforcement of their rights. The performing right societies are after all regulated monopolies, and a rate review court even now has jurisdiction of the broadcasters' petition challenging the reasonableness of ASCAP's television music licensing rates.

Motion picture producers who have music publishing subsidiaries may get enough additional money from local broadcasters under a source licensing system to offset the loss of blanket licensing royalties. Music publishers who are not affiliated with program producers and composers are likely to suffer significant losses in income if this bill passes. Even if the number of composers involved is smaller than the opponents of S. 698 claim, however, the Copyright Office has a particular concern for these individual composers. Composers may not get all they deserve under the blanket licensing system, but they do continue to receive at least 50 percent of the distributed royalties even when the copyright is assigned to the publisher or the producer. Proponents of S. 698 have alleged that composers could do as well or better under the source licensing system. They point to the new "residual" provision which purports to establish a right of compensation to be paid by the motion picture producer. Without collective bargaining and collective enforcement of rights, it is difficult to conclude that individual composers would get a fair shake.

Composers established the right to an assignment back of performance rights in music when they had a union bargaining for them. Composers no longer have unions to protect their rights. The source licensing legislation will take away the royalties paid composers through the blanket licensing system without realistically guaranteeing them any other royalties. Also the source licensing bill does not ensure that the composer will get a better initial payment than under the present system. Under the present licensing system, it is clear that an unknown composer gets very little money "up front" -- the unknown may settle for a token payment and screen credit with the knowledge that he or she is guaranteed a percentage of performing rights royalties and that this income may be substantial if the work is successful. Only a few known composers will have the bargaining clout to get a better initial payment.

Obviously both producers and broadcasters prefer to leave the responsibility for continued payment to the composer up to the other party. The Copyright Office believes that the present licensing system should not be changed unless the legislation also protects the composers of television music by mandating some kind of continued payment for the continued use of their work. S. 698 makes an effort in this direction by asserting a right to a composer's "interest," but does not go far enough to establish an effective legal right.

In this era of massive trade imbalances and budget deficits, the Copyright Office would also like to mention the possible impact passage of S. 698 could have on the foreign earnings of U.S. authors and composers. U.S. music and television programming are enormously valuable commodities in foreign television markets. With theatrical exhibition royalties, they are important expert earners. And the Congress, the Administration, and industry are striving mightily to improve market access abroad for these cultural exports, so as to bring their full commercial value back to American industry and labor.

Unfortunately, opponents of S.698 are correct in noting that what our copyright owners receive abroad for public performances of their works depends upon reciprocity-based agreements with foreign performing rights societies. Many of those societies already seek to reduce remittances to the United States because of our source licensing of theatrical exhibitions.

In the last Congress, foreign performing rights societies expressed their concerns about source licensing to the Administration and to Congress. It is, of course, hard to quantify what could be lost in foreign earnings. The point is, however, that foreign societies have a real incentive to limit royalty exports to the United Sttes, and S.698 could give them another reason to indulge that incentive.

The burden of showing the unfairness, unreasonableness, or inefficiencies of the present licensing system should rest on those advocating change. The courts have examined the present music licensing system and found that the broadcasters have not shown the present system is unreasonable or anticompetitive. To the contrary, the Supreme Court found that the blanket license results in "substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers ...."149/

S. 698 is a novel piece of copyright legislation: it would effectively wipe out the blanket licensing system for syndicated television programming -- this might eventually spread to the entire blanket licensing system. Moreover, it calls into question two established legal principles, the "divisibility of copyright" and the "sanctity of contracts." The Copyright Office urges caution before passing such a drastic measure at this time since other licensing alternatives are apparently available.

---

149. BMI v. CBS, Inc., 441 US 1, 21 (1979).

Answers to Questions from Senator Strom Thurmond

1. Question: At the conclusion of your statement you stated

> "proponents of S.698 may not be right when they say they can not realistically achieve source licensing at this time...the Copyright Office sympathizes with the broadcasters' contention that they bargain at a disadvantage with a monopoly to obtain licenses for music already fixed in the soundtracks of programs they have purchased. On balance, however, the Office is persuaded that legislation mandating source licensing tilts too far in favor of broadcasters."

You seem to be acknowledging that the present system is unfair to broadcasters, but disagree with S.698 as a solution.

Could you supply the Committee with alternatives which would address the problem you acknowledge broadcasters have in dealing with ASCAP while at the same time adequately protecting composers?

Answer:

My statement did not suggest alternatives to S.698 because I am not aware of any alternative that would both adequately protect composers and give broadcasters what they desire. Although the passage from my statement quoted above does indicate that broadcasters have some disadvantages under the current system, they also have many advantages. The blanket license permits broadcasters to make one payment that covers their use of any music licensed by the performing society. This is no small thing. The Supreme Court has observed:

> ASCAP reduces costs absolutely by creating a blanket license that is sold only a few, instead of thousands, of times, and that obviates the need for closely monitoring the networks to see that they do not use more than they pay for. ASCAP also provides the necessary resources for blanket sales and enforcement, resources unavailable to the vast majority of composers and pubishing houses. Moreover, a bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established.

Broadcast Music Inc. v. Columbia Broadcasting System, 441 U.S. 1, 21 (1979). Per program licenses are also available.

The issue ultimately is how much money broadcasters pay for this performance right. Although the Copyright Office has some sympathy with broadcasters' bargaining position, on balance, we think that the present system is fair.

2. Question:

In your conclusions you cited the existence of the rate court as a protection against abuse of broadcasters by ASCAP's monopoly powers. BMI is not subject to the rate court, however. What is to protect broadcasters from BMI's exercise of monopoly power?

Answer:

BMI is subject to a consent decree. Although the BMI decree does not specify that the district court may set the fee if the parties are unable to agree, courts, including the Supreme Court have concluded that the rates must be reasonable and that for antitrust purposes, the practices are similar. See Broadcast Music Inc. v. Columbia Broadcasting System, 441 U.S. 1. 12 no. 20 (1979).

It is our understanding that in the agreement reached between the All-Industry Committee and BMI this year, BMI agreed to ask that its consent decree be amended to provide for rate court review similar to that of ASCAP in order to resolve future bargaining stalemates.

3. Question:

You have expressed concern that foreign licensing societies, unhappy with U.S. source licensing legislation, might reduce their payments to U.S. copyright owners if S.698 is passed.

Please supply us with information as to the amount of payments now received from ASCAP and BMI as a result of foreign licensing of music in syndicated television programs. In addition, what evidence do you have that there would be a negative impact on this sum and what would you expect the amount of the reduction to be?

Answer:

ASCAP authors received $30.4 million from foreign societies in 1985, $40.2 million in 1986, and $49.8 million in 1987. ASCAP publishers received $35 million in 1987. ASCAP gave foreign societies $17.2 million in 1985, $16.8 million in 1986, and $27.2 million in 1987. BMI collected $31 million for writers and publishers in the fiscal year that ended June 30, 1987.

Over 15 foreign countries made payments to ASCAP in 1985. They include: "England" ($14,980,000); France ($4,641,999) and Canada ($6,441,000). We do not know how much of this amount comes from syndicated television programs.

There is clear evidence that foreign performing right societies are dismayed about the proposed source licensing bill. The European Communities expressed their dissatisfaction to the State Department. Delegation of the Commission of the European Communities, (August 1986). The general manager of the French performing rights society claims: "If this legislation is approved it will not be possible for ASCAP and BMI to function in the U.S., because the blanket-license system is absolutely indispensable for the good administration of musical copyright." Hennessey, Source Licensing Under Fire, Billboard, 1, 101 (November 15, 1986).

Several countries have already complained about paying for American music when no returns or fewer returns are made for the use of that country's music. For example, foreign societies pay ASCAP for the use of American music in movie theatres: ASCAP and BMI do not collect from movie theatres and do not, therefore, make any payments to foreign musicians whose work is performed in U.S. theatres. Some societies have already tried to charge ASCAP and BMI for their collection of these funds; others have suggested these payments should not be made if not reciprocated.

France and Canada make large payments to U.S. collecting societies and already have legislation requiring broadcasters to use a certain percentage of local music. If source licensing is mandated, it may not be possible for an American broadcaster to negotiate directly with each foreign composer. The broadcaster will then have to go through the foreign collecting society or forego using this music. If the first option is chosen, the broadcaster will have to deal with each foreign society on an individual basis which may be much less convenient than dealing with U.S. societies; if the latter option is chosen, both American audiences and foreign composers may suffer.

Certainly if source licensing legislation is passed, it is reasonable to expect that those foreign countries such as France and Canada that already try to limit the amount of U.S. music performed will retaliate further. Other countries may also try to limit such performance if the balance of payments between the U.S. societies and their collecting societies becomes even more one-sided because source licensing is mandated. It is not possible to make any reasonable estimate about the resulting loss of income to American copyright owners.

Senator DECONCINI. Mr. Oman, thank you.

The Senator from Alabama has just come in. Does he have an opening statement?

Senator HEFLIN. I'll submit it for the record.

Senator DECONCINI. Without objection, it will appear in the record.

[The prepared statement of Senator Heflin follows:]

OPENING STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

I would like to commend my colleague, the distinguished chairman of the Subcommittee on Patents, Copyrights and Trademarks, Senator DeConcini, for holding hearings on this issue which is important to so many of my fellow Alabamians.

As with almost every issue, I expect that persuasive arguments will be presented by both sides. However, in weighing these competing arguments, I think that it is important to keep in mind the dual purpose of copyright legislation—the promotion of public access to creative works, and the just compensation of the creators for these works. I support these dual goals, and believe that they are equally important.

I am concerned about the effect this legislation may have on the music industry. American music is indeed the most popular in the world, and this is due, in part, to the present copyright system. Any changes in that system should be approached with great caution. At the same time, I am also concerned about the apparent lack of licensing options available to broadcasters when negotiating for performance rights to music used in syndicated nonnetwork programs.

I look forward to hearing the testimony of the distinguished witnesses that will be testifying before us today.

Senator DECONCINI. Mr Oman, thank you for your testimony. You have been of assistance to this committee with technical advice, which we appreciate, from time to time. Quite frankly, we appreciate the fine work that you're doing at that Register's Office.

I would like to ask you this: you compare this bill with the one introduced last year. I take it from your statement that you oppose this bill as you did the one last year. Do you find any real improvement here, other than what you mentioned there, even though I take it that any improvement is not enough to sway you to come in favor of the bill?

Mr. OMAN. I think there has been a recognition, Mr. Chairman, that last year's bill would have severely disadvantaged the composers without giving them anything in return. The fact that they couldn't negotiate on an equal basis with the Hollywood producers was recognized in the effort to provide residuals statutorily for them, even though the amount of the residuals was unspecified. So this is movement in the right direction, but I'm not sure that, even taking it one step further—authorizing the composers to unionize—would still restore an equilibrium between the two parties.

Senator DECONCINI. Lastly, you mention a figure of $90-some million was paid by the broadcasters?

Mr. OMAN. That's the figure we came up with, approximately $95 million.

Senator DECONCINI. Where do you derive that figure?

Mr. OMAN. We looked at the statistics——

Senator DECONCINI. On growth revenues——

Mr. OMAN [continuing]. Given to us by ASCAP, BMI, and SESAC.

Senator DECONCINI. Fine, thank you.

The Senator from Utah?

Senator HATCH. It's been implied that "splitting" of synchronization and performance rights is somehow improper. In this regard, I'd like to quote from a seventh circuit court opinion which says:

> The right of an author to his intellectual property resembles any other personal property right. It may be sold outright in its entirety or a limited interest may be assigned. The various rights which compose a copyright may be split up and sold to different entities.

Now this suggests that the Copyright Act itself is a source of separate licensing for synchronization and, of course, performance rights. Would that be a fair reading of the copyright law?

Mr. OMAN. Yes, sir; that's what I was referring to when I said that the current system is true to the philosophies that underlie the 1976 act. Divisibility of copyright is one of the basic tenets of the copyright law, and each of these rights can be negotiated and sold separately.

Senator HATCH. We've also heard that local composers are somehow harmed by blanket licenses. My understanding, however, is that any local composer who writes for local TV and is a member of BMI, ASCAP, or SESAC, which is the routine situation, would be paid under the blanket license. Now if this is correct, do you see how the current negotiating system could harm local composers?

Mr. OMAN. I think you're correct in saying that they do share under the current blanket license. I suppose the argument is that local composers would get a bigger share if they were able to profit directly without having to have the money go into the pot. I think it's their opinion that that carries the day here. If they're the ones that feel that their interests are best served by having the money go into the pot and having them share ultimately in the distributions from the collecting societies, I think we should defer to that judgment and assume that they feel that in the long run their best interests are best served by the current arrangement.

Senator HATCH. Just a general question here: in your opinion, have negotiations between ASCAP and BMI and the composers on the one hand and the broadcasters on the other hand—have those negotiations been fair? Let me just add, too: and have the courts had adequate discretion to insure fairness?

Mr. OMAN. Well, I wish I had been a fly on the wall to oversee those negotiations. I wouldn't be the one to judge whether they have been fair or not. Historically, I think the results have been, in the opinions of the courts, basically fair.

Senator HATCH. I think that's what I'm talking about, the results.

Mr. OMAN. Over the years the rate has come down fairly substantially, from 2 percent down to approximately 1.2 percent under the current regime. So there does seem to be some give and take. It's not a matter of ASCAP presenting a take-it-or-leave-it situation to the broadcasters. They have negotiated. There are advantages and disadvantages that they both take advantage of, and the rates over the years have come steadily down.

Senator HATCH. It does seem that a blanket license does have an advantage. It does not force the composer to guess at the time of synchronization how much future performance rights might be worth. This would be impossible because it's difficult to decide how popular particular items of music or particular TV programs might become. So the new residual proposal attempts to do the same, but is there any reason to make the change at this time? Can you think of any real substantive reason to make the change?

Mr. OMAN. You will have an opportunity to ask the composers today whether or not in their view changes are necessary at this point. I think the answers will be no.

From our perspective, the system has worked well. It is a system that is used in every other industrialized country in the world, and it's a system that promotes the public interest and promotes the interest we all have in encouraging creativity.

Senator HATCH. It seems to me that the blanket license system serves the same function or purpose. It has been worked out in open market negotiations. Why should we risk abandoning a working system for something that may not work?

Mr. OMAN. I think that's the question that the composers ask.

Senator HATCH. Let me add one more question to that: why should we inject government into the process if we have a system that's working within the market system?

Mr. OMAN. The broadcasters, I'm sure, will say that they do not, in fact, have the options available that the composers say they do. They say that they cannot realistically negotiate a source license at this point even though that's theoretically possible.

If there were some way of giving the broadcasters more in the way of realistic alternatives, I suspect that would be a useful development, but I'm not sure that it requires the intervention of the Federal Government to do that.

Senator HATCH. Thank you, Mr. Chairman.

Senator DECONCINI. The Senator from Massachusetts?

Senator KENNEDY. Thank you, Mr. Chairman.

I, too, want to join in welcoming Ralph Oman to the committee; also, Dorothy Schrader. I think those of us who served here with Senator Mathias know that you were a good and valued counsel to Senator Mathias. Senator Mathias is known for many different activities, but perhaps one of the areas that he was not known as well, maybe in this country—I think probably internationally he was—was for his work on patents and copyrights. I know that he has spent a lot of time on that issue, and I know that you worked very closely. We want to welcome you back here.

I want to commend you for your submission. I think that was an excellent historical analysis of this whole issue. I would hope that the members would have a chance to review that because I think it has a lot of good information on it. You've been accommodating to the Senators in having as brief a statement and responding to the questions, for which obviously we're grateful. I would hope that the members would take the time because I think it's an enormously valuable asset for the committee.

As you gathered from the outset, I think with all of the different things that we have to do in this body at this time, how nice it is to join my Senator from Utah—we haven't been agreeing on many things recently. [Laughter.]

But we appear to be right on target on this one, and that's always of some interest.

It does seem to me with all of the problems we have something that is working. Maybe we have to think—as legislators, we ought to constantly. We don't do that probably as well as we should in terms of overseeing and upgrading the systems.

But I gather from your testimony that the system has worked well and that maybe there are some adjustments and maybe some changes that should be made, but that it has basically worked well. I think with all of the challenges that we're facing, I for one wonder how much time we're going to be spending in terms of trying to find out how to deal with this when we've got so many other things on our plate.

Second, I am also very much concerned about the whole impact of various legislation on the creative arts and the artists. As we have gone through here, when we did the old Copyright Act—and there's a wide range of creativity, a wide variety of creativity in a whole range of different areas of undertaking. I think we have to be very careful about what the impact of this is going to be on the creative aspects of our society, because in far too many instances their interests are threatened. That causes me pause.

I just have a couple of questions, and then maybe I'll submit some because the chairman has been good to have these hearings, and all of us are busy.

On the issue of the creators of the artistic works in our society and providing a framework for fair compensation, in your view both the composers and songwriters, if this were to become law, what would be the impact on them? You make some reference to it, but I'd like you, if you would, to just clarify that.

Mr. OMAN. The $95 million that they ultimately share in would probably suffer a considerable reduction because the negotiating powers would be so severely reduced. If that pot that they eventually share is reduced, they will take home less money. Few of them will be able to make a living writing music, and I suspect that we will have less creation in the United States.

Senator KENNEDY. What also—and, again, you touched upon it when I listened to you earlier, but I would like to underline it—what happens to the virtually unknown composers and creative people with the kind of alteration and change in the process? What would be the impact on those newer artists, even given the consideration where the broadcasters say, well, we're going to promote that in terms of the various regionalizations and we're going to be more aggressive in terms of reaching out?

I've heard them make a case that they think that they can do better for the unknown and the younger artist. What is your analysis?

Mr. OMAN. I suspect that the younger, unknown authors would strongly favor the current system. It's the big names who are able to negotiate favorable deals, and they would probably do OK if the system were changed. Those without the leverage, without the negotiating power, probably would not be able to negotiate favorable financial arrangements with broadcasters if they were given the opportunity.

Senator KENNEDY. In this the payment of residuals is obviously of critical importance. I'll submit that. I have other questions, Mr. Chairman, for Mr. Oman. I see that we've got a number of our colleagues here, and I would like to be able to submit those.

Senator DECONCINI. The record will stay open, Senator Kennedy. The Senator from Iowa?

Senator GRASSLEY. Mr. Chairman, I'm not going to ask any questions of this panel, but if I could, I want to do two things now: First, insert my opening statement in the record.

Senator DECONCINI. Without objection, it will appear in the record.

[The prepared opening statement of Senator Grassley follows:]

PREPARED STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

I want to thank you, Mr. Chairman, for holding this hearing on the Syndicated Television Music Copyright Reform Act of 1987. I appreciate the opportunity to listen to the fine group of witnesses you have assembled for our subcommittee today.

Those of you who were members of this subcommittee last year are familiar with the issues to be presented to us today. As you are well aware, in 1986, the subcommittee heard extensive testimony regarding similar legislation that addressed these same issues. All of the parties involved in this issue have been in contact with me and I appreciate it very much. They have all made persuasive arguments for their particular point of view in this debate.

The broadcasters in Iowa have indicated to me their very real concern with the present system of compensation for songwriters for the music used in syndicated television programming. These local broadcasters contend that they are forced to purchase the broadcast rights to music that is a part of a syndicated television program separately from the broadcast rights of the television program itself.

In order to obtain these separate rights, the broadcasters must go to either ASCAP or BMI—the two performing rights societies. The local broadcaster is required to go through either ASCAP or BMI, no matter how many copyrighted songs are contained within the soundtrack of a syndicated television program. Because a syndicated television program is virtually useless without the accompanying music—and because ASCAP and BMI control nearly 95 percent of the music licensed under the current blanket license system—the local broadcaster feels at a disadvantage when bargaining with either ASCAP or BMI.

The broadcasters believe the source licensing system proposed in S. 698 would eliminate an impediment to the operation of a true free market in this segment of the entertainment industry.

They contend that S. 698 would provide for a more fair and equitable compensation system for all concerned by allowing them to obtain the broadcast rights directly from the source of the music—the copyright holder of the music—who the broadcasters contend is usually the producer of that syndicated television program.

Likewise, songwriters and composers have explained to me how they believe the compensation system proposed by this legislation would be unfair, unnecessary, and how it might possibly cause the destruction of the American music industry as we have known it to operate over the past many decades. The producers of television programs and the advertising industry have let me know how burdensome and unworkable they believe source licensing would be for them.

They believe that source licensing would interfere with the current "freely functioning" marketplace, because broadcasters have bargained successfully with ASCAP and BMI in the past over the rights to broadcast the music contained in syndicated television programs.

If no agreement is reached through bargaining between the broadcasters and ASCAP and BMI, then the broadcasters can always go into court under the antitrust consent decree that governs ASCAP.

Finally, according to the songwriters and composers, the broadcasters have chosen to use the blanket license. However, nothing stops them from asking studios for a source license; or obtaining a direct license from the composer of the music; or obtaining a per-program license from ASCAP and BMI. In fact, the songwriters and composers have explained that a 1984 Federal second circuit court decision unanimously upheld this right.

Mr. Chairman, we are here today to listen to both sides of this issue. I will be interested in the testimony to be given by all of those who have taken such an interest in this subject. I want to thank them all for taking the time to come here today to educate us and I want to thank you again for this opportunity that will allow the subcommittee to listen and learn.

Mr. Chairman, due to a scheduling conflict, I will not be able to remain very long. Therefore, I would now like to acknowledge the presence of Mr. Philip Lombardo of Citadel Communications, the owner of one of the finest television stations in my State of Iowa—KCAU-TV in Sioux City, IA. I want to thank Mr. Lombardo for taking the time to appear before our subcommittee today and I am looking forward to reading his testimony.

Thank you, again, Mr. Chairman.

Senator GRASSLEY. Second, Mr. Chairman, I would like to recognize Mr. Philip Lombardo of Citadel Communications, which owns one of the television stations in my State, KCAU-TV, of Sioux City, IA. I want to thank Mr. Lombardo for taking time to appear before our subcommittee. I will be reading his testimony with great interest. Thank you, Mr. Chairman.

Senator DECONCINI. I thank the Senator from Iowa.

The Senator from Alabama, does he have any questions of Mr. Oman?

Senator HEFLIN. I believe not.

Senator DECONCINI. Thank you, Mr. Oman, very much.

Mr. OMAN. Thank you, Mr. Chairman.

Senator DECONCINI. At this moment I am going to call on the Senator from South Carolina. As you know, he's the sponsor of this legislation and really is the fifth member of the panel that is there—or the first member of the panel that is there.

Senator Thurmond.

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. Thank you very much, Mr. Chairman.

Mr. Chairman, I am pleased to appear today before the Patents, Copyrights and Trademarks Subcommittee to support S. 698 which I introduced on March 10, 1987. This bill will provide fair and equitable reform to the process of licensing performance rights and copyrighted music which accompanies nonnetwork programs for broadcast on television.

This bill is substantially similar to a bill that I introduced last Congress. Generally, this legislation will change the current way that music included in syndicated programs is bought and sold. It will allow free and open bargaining for this music rather than the current lump-sum payment which is established without regard to the specific music.

More particularly, this bill provides that when the rights to syndicated programming are sold, the rights to broadcast the music included in that program must be sold at the same time.

A discussion of the current system for licensing performance rights in television music illustrates why the change proposed by my bill is necessary. Currently, when a broadcaster purchases a syndicated program, he receives all the rights necessary to broadcast the program except the rights to the music. In order to obtain the rights to the music, the broadcaster must purchase a blanket license from one of the two major performing arts societies, ASCAP or BMI.

What a broadcaster receives by buying a blanket license is the right to all the music that is owned by ASCAP and BMI, about 4 million compositions, even though he may only need the two or three songs actually included in the particular program.

This forces a broadcaster to pay for music he may never use. Additionally, the payments made by the broadcaster for the programming and the blanket license differ in one major respect: the payment for the blanket license, unlike the payment for the programming, is established without regard to the specific sought to be used. Instead, the blanket license is a percentage, currently about 2 percent, of the television station's gross revenues with adjustments.

It is readily apparent that the payment for the blanket license is in no way related to the amount paid for the remainder of the program, the value of the music to the particular program, or the number of compositions actually used by the broadcaster. Therefore, while a broadcaster is able to bargain over the table for the rights to a television show like "Magnum P.I.," he is unable to bargain for the rights to any music in that program.

The system I propose would allow the broadcaster to go to the source, the producer, copyright owner, and bargain for the music in the program at the same time he bargains for the rights to broadcast the rest of the program.

Opponents of this measure continue to raise two major arguments against this bill. They argue, first, that it will adversely affect composers and, second, that broadcasters currently have an avenue of relief by petitioning the rate court for a change in the cost of the blanket license.

First, with regard to the adverse impact on composers, let me say that it has never been my intention to deprive composers of the right to payment for their music. Therefore, the bill I introduced this session specifically provides that when syndicated programming is purchased, the composer of the music will be entitled to receive a portion of that payment. The exact amount of the composer's share would be negotiated between the studio and the composer. However, it will allow the composer to be paid on a continuing basis, similar to the way actors and script writers are compensated for their interests in the same program. I believe that this change will ensure that the composer receives payment for his work.

As to the second major argument against this bill, the rate court currently sets the cost of the blanket license. However, the court does not have the power to provide for a different form of licensing music as my bill would.

There are several other misconceptions about this bill which should be clarified. This legislation is narrow in scope. It applies only to syndicated television programming. It will not in any way change the current blanket licensing system as it applies to the use of music in radio, restaurants, concert halls, and network programming. As well, this legislation will not apply to every composer. It will apply only to those composers whose music is used in prerecorded syndicated programming. I have been informed that this is about 15 percent of all the composers affiliated with ASCAP and BMI. Therefore, this bill will not apply to 85 percent of the composers whose music is not used in syndicated programming.

Let me also make it clear that this legislation will not allow broadcasters to use music without first paying for it. What it will do is provide for a system similar to the one that has been successfully implemented since 1948 with regard to the licensing of movies shown in movie theaters.

In considering this bill, you may wonder why the television studios and publishing companies are so opposed to this change. I believe that it is because they receive unjustified benefits under the current arrangement. It is important to recognize that the studios not only receive payment from the broadcasters for the program, they also receive a portion of the royalties collected by ASCAP and BMI.

The composers are often employees of the television studios. As a result, the studio will often own the rights to the music. The studio may also transfer the rights to the music to a publishing company, which is often a subsidiary of the studio. The publishing company, in turn, licenses that music to ASCAP or BMI. When the royalty payments are distributed, a portion is distributed to the owner of the public performance—the publishing company and the composer.

In closing, the Constitution gives Congress the power to pass laws to protect copyrights in order to assure that there is a proper balance between creators and the users of their creations. It is our duty to intervene when that balance no longer exists. The more than 900 local broadcasters around the United States have no other realistic option but to purchase blanket licenses. I believe that we must act now to restore balance to this area of the copyright law.

Finally, I would like to thank Senator DeConcini, the able Senator from Arizona, for having this hearing today. Also, I am willing to work with Senator DeConcini and others in order to make changes to improve this bill.

Thank you very much, Mr. Chairman.

Senator DECONCINI. Thank you, Chairman Thurmond. We appreciate your testimony here.

We're now going to proceed to the first panel: Mr. Leslie G. Arries—oh, excuse me, Senator Wilson. It slipped my mind, Senator. Excuse me.

Senator Wilson of California was due to testify at 10:30 and we're 9 minutes off of that. Senator Wilson, we'll be glad to hear your testimony at this time.

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator WILSON. Thank you very much, Mr. Chairman.

I appreciate the opportunity to appear before the subcommittee regarding the licensing of music performance rights. In the interest of the subcommittee's time—and, I confess, my own—as well as the interest of minimizing the expenditure of taxpayers' dollars on printing costs, I don't have a long prepared statement to read or to submit for the record. I will leave to the expert witnesses that you have assembled to explain on a point-by-point basis why this bill is entirely unjustified and unneeded.

What I will try to do succinctly is to state why I feel as a matter of legislative discretion that we should not impose a Federal regulatory scheme on the music licensing marketplace.

As you know, Mr. Chairman, and the other members of the subcommittee know, the Constitution explicitly empowers the Congress to regulate commerce and to secure certain rights to authors. Beyond those general instructions, we are left to use our sense of fairness as well as our common sense in the exercise of that power.

With this in mind, I reviewed the various facets of the music licensing debate as well as Senator Thurmond's bill, S. 698, and I came to certain conclusions. Ultimately, I determined that this dispute between television broadcasters on one side and the composers, authors, and publishers on the other rested on one very simple question.

The question to be resolved is not whether the music licensing organizations—BMI, ASCAP, and SESAC—have acted in a monopolistic fashion in their representation of the creators of music. If they had acted as monopolists, our antitrust laws would provide all of the means of relief necessary to anyone aggrieved of that monopoly. However, the courts have repeatedly ruled that the market for the performance rights of music presents a number of reasonable choices for the broadcasters. In other words, the courts have found that it is fair and competitive.

The question to be resolved is not whether television producers should utilize another method for licensing, the so-called source license. A source licensing requirement would steal from music composers and lyricists their opportunity to share in the rewards of having done well, of having written something that the public wants to hear.

On the other hand, if we want to allow the creators of music to have a reason to create more, if we want to give a real opportunity to those who invest so much energy, who take a run at the gold ring, and who have so little chance of financial success, if we want to be fair, not only would we reject the proposed legislation, we would endorse the present licensing system.

Well, Mr. Chairman, these questions are relevant, but they are not at the core of what the Congress must resolve. The real question to be resolved is whether there is any reason for Congress to be involved at all in this dispute. In my view, the answer is clear: there is simply no compelling national interest at stake to justify the Congress barging into the music performance rights marketplace and establishing an arbitrary rule to tip the scales in one industry's favor over another's.

Of course, we do have the power to act to settle this dispute. The question is, Should we? If the marketplace were unfairly skewed by monopolistic practices, there would be justification for our intervening. If a Federal decision, such as the awarding of an exclusive Federal license, had slanted the playing field, in that case it would be proper for us to act.

But when a group of buyers simply contends that they are paying too much for a particular product and they can make no conclusive showing of impropriety under our laws that outlaw anticompetitive practices, then, I submit, Mr. Chairman, we should not act. There is no justificiation, no requirement shown for our intervention.

We in the Congress should no more be dictating the way music rights are licensed than we should be telling Dominos how much to charge for delivering pizza. While I certainly don't equate these two markets, I am simply trying to indicate that I think it's ridiculous for us to get involved in a situation where there is no justification for our involvement. The marketplace I think is working fairly and equitably. There has been no violation of antitrust laws. I think, with all due respect, that the committee has much more demanding obligations and, even if your calendar were clear, I would feel there was no justification for our intervention.

Thank you.

Senator DeConcini. Thank you, Senator Wilson.

Let me just ask you a hypothetical question: What would you do if the former chairman of the committee and the President Pro Tem of the Senate asked you to hold the hearings? [Laughter.]

Senator Wilson. I believe I'd honor that request. [Laughter.]

Senator DeConcini. I thank the Senator for his honesty in approaching this particular difficult subject matter.

I have no questions. Thank you, Senator Wilson.

Does the Senator from Iowa have any questions?

Senator **Grassley**. No, I have no questions.

Senator **DeConcini**. The Senator from Massachusetts?

Senator **Kennedy**. No.

Senator **DeConcini**. The Senator from Alabama?

Senator **Heflin**. No, Mr. Chairman.

Senator **DeConcini**. Thank you, Senator Wilson.

Senator **Wilson**. Thank you, gentlemen.

Senator **DeConcini**. Before we call our first witness, I have a prepared statement by Senator Gore to be inserted in the record at this time.

[The prepared statement of Senator Gore follows:]

PREPARED STATEMENT OF HON. ALBERT GORE, JR., A U.S. SENATOR FROM THE STATE OF TENNESSEE

Mr. Chairman, each of us is proud to serve a State or district, and we probably boast of its unique character, the thing that sets it apart from all others. This is true of Tennessee, which I serve, and I might add, my father also served in the Senate. Incidentally, he still found the time to polish his considerable skills as a fiddler, country-style.

One of the things that sets Tennessee apart is music. Nashville has come to be known worldwide as Music City USA, the home of hundreds of performers, songwriters, producers, and technicians that make the wonder of country music—indeed all music—possible. It is on behalf of this creative community that I take this opportunity to state my opposition to S. 698. I oppose it not only because of the harmful impact this legislation would have on Tennessee's music industry, but the negative effect it would have on all of American music and those who create it, and on the copyright law now in force.

During the 99th Congress I repeatedly stated my substantive objections to efforts to destroy the efficient system of blanket licensing now in place. The bill this year is basically the same measure, and my objections are as appropriate today as they were last year.

Others who will be heard in opposition are the performing rights organizations, ASCAP, BMI, and SESAC, as well as individual composers, lyricists and publishers. Motion picture and television producers and advertizers will address the specific issues raised by the bill.

I have reviewed their current analysis of S. 698, and can confidently reinforce their opposition. I urge the subcommittee to take their views to heart before acting precipitously on this bill. And I also want to encourage the subcommittee to invite the testimony of three other organizations before it acts on S. 698—the National Songwriters Association International, the National Academy of Songwriters, and the Songwriters Guild of America. This is a community of creative artists which must be heard if the record on S. 698 is to be complete.

I want to limit my remarks this morning to the impact of this legislation on the American cultural community, its effect upon copyright law and the ramifications for America's standing in the international cultural community.

The object of copyright law is not to enrich copyright owners, whether they be broadcasters, film and television producers, composers or publishers. Its purpose is to promote the public interest by encouraging creativity.

In the language of the Supreme Court: "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that *encouragement of individual effort is the best way to advance public welfare* through the talents of authors and inventors in 'Science and the useful arts.' Sacrifical days devoted to such creative activites deserve rewards commensurate with the services rendered."

Will passage of S. 698 encourage creativity for the public benefit?

The answer is a resounding "no" and that answer comes from those organizations and individuals in the best position to know. For instance, not a single group representing the creative community has come forward to support this legislation. Indeed, each organization has seen it as detrimental and has gone on record as unalterably opposed to S. 698. If public benefit is the test, this legislation fails.

Passage of the bill could also create disturbing worldwide effects. America is a major contributor to the international intellectual community and rightly so. Though one of the world's youngest nations, we have much to offer from our cultural table. And what we offer is eagerly sought.

America's films, television shows and particularly its music travel easily and find a warm welcome everywhere. In our balance of trade picture, this is one of the few bright spots.

On that important world stage stands CISAC, the International Confederation of Authoral Societies with representatives from some 60 nations. The confederation cuts across cultural and political lines, and here, too, there is deep concern. The organization has unanimously passed a resolution in opposition to the intent of the legislation, recognizing it as harmful.

It seems contradictory that we would consider S. 698, which would mark a copyright protection setback, as Congress is also being asked to expedite our membership in the Berne Convention for the Protection of Literary and Artistic Works, an international copyright treaty with 76 member countries. We are one of the few nations which are not signatory to the convention, now 101 years old. S. 698 is in direct conflict to the message we want to send to the international creative community.

In summary, I want to thank the chairman and the subcommittee members for its determination to review every aspect of this bill, for its anticipated deliberativeness in the face of the bill's proponents call for precipitous action.

I look forward to working with you to establish a balanced, complete record. Thank you.

Senator DECONCINI. We now will go to the first panel and we'll have Mr. Leslie G. Arries, Jr., Buffalo Broadcasting Company; Mr. C.E. "Pet" Cooney, KPNX-Television, Phoenix, AZ; Mr. Dick De Angelis, KPHO-TV, Phoenix, AZ; and Mr. Philip J. Lombardo, Citadel Communications, New York City.

At the request of the Senator from Iowa, I'm going to ask Mr. Lombardo to lead, unless you have a set presentation you all want to give, because the Senator from Iowa is going to have to go to other commitments.

We would ask that you keep your statements in a summary manner, if you will. We have about 35 or 40 minutes for this panel because we have another panel we have to hear, and we would ask you to do that, please.

PANEL 1

STATEMENT OF PHILIP J. LOMBARDO, CITADEL COMMUNICATIONS, NEW YORK, NY

Mr. LOMBARDO. With your permission, Mr. Chairman, we'll proceed through each of our presentations and then be available for questions as a group.

Senator DECONCINI. Fine.

Mr. LOMBARDO. Senators, I'm Philip Lombardo and I was asked to speak today in order to give the subcommittee the opportunity to talk with a local television broadcaster who has had over 30 years of hands-on experience with the creation and purchase of programming and the licensing of music copyrights.

My early years in television were spent on the creative side of the business, starting in the prop shop at WBBM-TV in Chicago as a production assistant. Later I worked in various programming functions at stations in Ohio and Illinois. I have been a member of the Directors Guild of America for nearly 30 years.

In the last 5 years I have built a company which operates stations in Vermont, upstate New York, Illinois, Iowa, and Nebraska. That company, Citadel Communications, has been built by taking over stations which were in trouble and fixing them, remaking them into something the public wanted to tune into and advertisers were willing to pay to reach.

My first station in Burlington, VT, was on the verge of bankruptcy when I purchased it with the help of a major debtor bank. What enabled me to turn WVNY around was an understanding gained through many years of experience of what program elements win an audience and then focusing on those elements, eliminating those which do not excite or serve viewers. This means understanding your market and putting your limited resources into the kind of people and programming which the public in that market wants: the right combination of news, sports, and information programming along with the right mix of syndicated and feature film programming.

At the core of this process is the ability to control costs, particularly programming costs. A large portion of a station's operating budget is in the form of payments for performance copyrights. The copyright to broadcast is what we are buying when we buy a syndicated show or when we hire creative talent such as script writers, directors, and on-camera performers for our shows.

We currently are able to bargain directly with copyright owners for the performance copyrights to everything we air except one thing. The background and theme music which the Hollywood studios insert into the syndicated shows they sell us. When I buy a show from Paramount, MTM, Lorimar, or Warner Brothers, I recall all the performance copyrights necessary to air the show except one, the music.

It is easy for the Hollywood studio to bargain with me and sell those rights as one package because it owns all of them. Ironically, it almost always owns the music copyright as well since 90 percent of the music in syndicated shows is written by composers who work for hire as employees of the studio, but that's not included in my license fee. Instead, the studios have chosen to avail themselves to a judicially sanctioned monopoly. All studios assign their music copyrights to one of two licensing societies: ASCAP and BMI. They, in turn, demand a flat payment, historically a percentage of the station's total revenues, not simply a portion of the money generated by the program themselves.

As a result of this system, this payment covers not only the music contained in the shows we have purchased, but all the copyrighted music in the 4-million-title library of ASCAP and BMI. Each station pays for the same blanket license under exactly the same formula and receives exactly the same songs. If this were a Labor Department issue, this would be called featherbedding at its worst extreme.

It is a terrible burden on local television today because it precludes the most basic principle of the broadcasting business: the ability to decide where you will spend your total programming dollar.

At our Burlington, VT, television station, which is technically disadvantaged to its competitors—it's a UHF versus VHF—in 1987 the estimated payment to ASCAP, BMI, and SESAC will be equal to the amount paid for all syndicated programming and will exceed the cost of running my local news operation for a full year.

Mr. Chairman, we television broadcasters are prepared to pay for products we need. All we desire is the right to bargain and pay for those products. We know in most instances music is an important element of the show, and we expect that the addition of music to the package sold to us will raise the price. However, we need to have greater control over where we put our total programming dollars to be better able to carry out our own creative function, to assemble schedules of programming which will provide the public with the kid of diversity and excellence the copyright system was intended to foster. The current system is unfair.

As a broadcaster and businessman, I ask not that you treat me favorably but fairly. S. 698 will do that.

Thank you.

[The prepared statement of Mr. Lombardo follows:]

Statement of Philip J. Lombardo
on Behalf of
The National Association of Broadcasters

Mr. Chairman and Senators. Thank you for the opportunity to testify today on behalf of the National Association of Broadcasters. The NAB is the united voice of broadcasting, including within its membership over 5,000 radio stations, the more than 900 commercial television stations, both network affiliates and independents, and all major commercial networks.

Although the legislation before you today is narrowly drawn and affects only music copyrights in syndicated programs sold to local television stations, its enactment is supported by all elements of the broadcast industry.

Broadcasters both own and use copyrights. Achievement of a fair and modern copyright system -- the objective of S.698 -- is a goal of every broadcaster affiliated with the NAB.

The President of the NAB, Edward Fritts, asked me to represent the industry here today because he wanted to give the Subcommittee the opportunity to talk with a local television broadcaster who has had many years of hands-on experience with the creation and purchase of programming and the licensing of music copyrights.

I have worked in the broadcast business for over 30 years, beginning as a part-time radio announcer in college.

My early years in television were spent in the creative side of the business, starting in the "prop shop" at WBBM-TV in Chicago as a production assistant. Later I worked in various programming functions at stations in Ohio and Illinois. I have been a member of the Directors Guild of America for nearly 30 years.

Having worked at putting together television programs for much of my life, I believe that I know something about what elements in a show are important to its success and how to value those elements.

In the last five years, I have built a company which operates stations in Vermont, upstate New York, Illinois, Iowa and Nebraska. That company, Citadel Communications, has been built by taking over stations which were in trouble and fixing them -- remaking them into something the public wanted to tune in to and advertisers were willing to pay to reach.

My first station, in Burlington, Vermont, was on the verge of bankruptcy when I purchased it with the help of its major debtor bank.

What enabled me to turn WVNY around was an understanding, gained through many years of experience, of what program elements win an audience and then focusing on those elements -- eliminating those which do not excite or serve viewers. This means understanding your market and putting your limited resources into the kind of people and programming which the public in that market wants -- the right combination of news, sports, and information programming along with the right mix of syndicated and feature film programming.

At the core of this process is the ability to control costs, particularly programming costs. A large portion of a station's operating budget are in the form of payments for performance copyrights. The copyright -- to broadcast -- is what we are buying when we buy a syndicated show or when we hire creative talent such as scriptwriters, directors and on-camera performers for our shows.

We currently are able to bargain directly with copyright owners for the performance copyrights to everything we air except one thing -- the background and theme music which the Hollywood studios insert into the syndicated shows they sell us. When I buy a show from Paramount, MTM Productions, Lorimar or Warner Brothers, I receive all of the performance copyrights necessary to air the show -- except one -- the music. I receive the copyrights to the work of the scriptwriters, directors, choreographers and producers of the show. It is easy for the Hollywood studio to bargain with me and sell those rights as one package because it owns all of them. Ironically, it almost always owns the music copyright as well, since 90% of music in syndicated shows is written by composers who work-for-hire as employees of the studio, but that's not included in my license fee.

Instead, the studios have all chosen to avail themselves of a judicially sanctioned monopoly. All studios assign their music copyrights to one of two licensing societies -- ASCAP and BMI. They, in turn, demand a flat payment, historically a percentage of the station's total revenues, not simply a portion of the money generated by the programs themselves. As a result of this system, this payment covers not only the music contained in the shows we have purchased -- but all the copyrighted music in existence in the world. Each station pays for the same blanket license under exactly the same formula and receives exactly the same songs. If this were a labor department issue, this would be called featherbedding at its worst extreme.

It is a terrible burden on local television today because it precludes a most basic principle of the broadcasting business --

the ability to decide where you will spend your total programming dollar. At our Burlington, Vermont, television station (which is technically disadvantaged in the competitors) in 1987 the estimated payment to ASCAP/BMI/SESAC will be equal to the amount paid for all syndicated programming and will exceed the cost of running my local news operation for a full year.

Mr. Chairman, we television broadcasters are prepared to pay for products we need. All we desire is the right to bargain and pay for those products. We know in most instances music is an important element of the show, and we expect that the addition of music to the package sold to us will raise the price. However, we need to have greater control over where we put our total programming dollars to be better able to carry out our own creative function -- to assemble schedules of programming which will provide the public with the kind of diversity and excellence the copyright system was intended to foster.

The current system is unfair. As a broadcaster and businessman, I ask not that you treat me favorably but fairly. S.698 will do that. Thank you.

* * *

PHILIP J. LOMBARDO

Currently chairman, president and chief executive officer of C.C.C. Communications Corporation, Lombardo Communications, Inc. and P.J.L. Investments, Inc. Managing general partner of Citadel Communications Company, Ltd., the operating entity for WVNY-TV, Burlington, Vt., WUTV, Buffalo, N.Y., KCAU-TV, Sioux City, Iowa, WMGC-TV, Binghamton, N.Y. and KCAN-TV, Albion Nebraska. Managing general partner of Coronet Communications Company, the operating entity for WHBF-TV, Rock Island, Il. Managing general partner of Canadian Communications Company national sales representative for U.S. television stations in Canada.

Former chairman, president and chief executive officer of Corinthian Broadcasting Corporation.

As head of Corinthian, he oversaw the operations of the group's six television stations, five of which were CBS affiliates: KHOU-TV, Houston; KOTV, Tulsa; KXTV, Sacramento; WANE-TV, Fort Wayne; WISH-TV, Indianapolis; and one ABC affiliate, WVEC-TV, Norfolk, Virginia; TVS, a leading producer of sports and special programming; Peter Griffin Woodward (PGW), a national sales representative company; Pembroke Cable Corporation; Corinthian Productions, a division responsible for development of new program forms for television; and Corinthian Video Training, training programs for the business of management development.

Mr. Lombardo joined Corinthian Broadcasting Corporation in August, 1973 as president, Television Stations Division. In January 1974 he was named president and chief operating officer, Corinthian Broadcasting Corporation. In February, 1977 he became chairman, president and chief executive officer of Corinthian Broadcasting Corporation.

From April, 1968 to August, 1973 Mr. Lombardo served as vice president, general manager of WGHP-TV, High Point, North Carolina. He was also a member of the board of directors of Southern Broadcasting Company, the parent company.

Prior to his employment with WGHP-TV, Mr. Lombardo held a variety of positions in the industry, including assistant general manager, program manager, producer-director and account executive. His broadcasting career began in 1957 and has progressed steadily over the past 30 years.

EDUCATION:

He received a bachelor of arts degree in 1957 from the University of Missouri. He also has completed the Harvard Business School Advanced Management Program.

PERSONAL:

Mr. Lombardo was born on June 13, 1935 in Chicago, Illinois. He and his wife, Kim, and their two sons, Dean and Jeffrey reside in Bronxville, New York.

PROFESSIONAL ACTIVITIES:

Board of Directors, The Gabelli Group; Board of Directors, Lynch Corporation;; former member, Board of Directors, Television Information Office; former member, Young Presidents Organization; former member, Board of Governors, International Radio and Television Society.

Senator DECONCINI. Thank you, Mr. Lombardo.

I will yield to the Senator from Massachusetts.

Senator KENNEDY. Mr. Chairman, I know the purpose of these hearings, even though the witnesses might not know it this morning, is to hear from them rather than from us, but I want to apologize to this panel for not being able to hear them. We're in the final consideration of the defense authorization bill with the House, and we're hopeful of having the final meeting at 11 this morning. So I'm going to necessarily have an excuse myself.

I wanted also to apologize to Ed Cramer, Hal David, Alice Prager, and Mike Post, who will be testifying on the next panel, and I would indicate that we'll certainly value their testimony and look forward to reviewing it in careful detail.

I thank the Chair.

Senator DECONCINI. Thank you, Senator Kennedy.

Mr. De Angelis, if you would summarize your statement, your full statement will appear in the record.

STATEMENT OF RICHARD DEANGELIS, KPHO-TV, PHOENIX, AZ

Mr. DEANGELIS. Thank you.

Mr. Chairman, thank you for the opportunity to appear on behalf of INTV, the Association of Independent Television Stations. INTV is a voluntary association representing the Nation's independent stations. Our stations operate without the benefit of programming supplied by ABC, NBC, or CBS.

The independent stations must fill every minute of our program day with programs we produce ourselves such as news, public affairs, or sports, or we must go to the Hollywood program market and buy movies and syndicated programs. We operate in a free market. We do not enjoy any special copyright subsidies or privileges, say, as the cable compulsory license or the statutory license now being proposed for the backyard satellite dish industry.

This means that we are among the most copyright-dependent industries in the Nation. Please remember that what we buy from Hollywood is nothing more than public performance copyrights.

Ours is a highly competitive business. INTV currently has 177 member stations. In the past year alone 23 independent stations, a number equal to 13 percent of our entire membership, were forced into bankruptcy proceedings.

Stations like mine without the security or sameness of network programs account for much of the diversity which exists in free television today. It is we who offer the alternatives, alternatives such as expanded news and public affairs, kids, sports, and religious programming of local interest as well as a vast array of Hollywood programming in the form of movies and syndicated shows.

The ability to bargain with sellers of programming on a case-by-case basis is vital to my station's ability to stay in business. If I pay more for performance rights than I receive in advertising dollars, I will go out of business. In fact, excessive program costs are the principal cause of the 23 bankruptcies in independent television.

According to the latest surveys, program costs account for approximately 50 percent of the total expenses for the typical independent station. In the past 2 years my program costs have increased 71 percent. I, like any other businessman, must make hard choices. If I spend more for one Hollywood product, I may have to spend less for another. It is this process of making hard decisions in an open market which results in diversity among stations and is the essence of our business. It is also what the copyright law is all about.

Let me be clear about one thing: the independent stations are not seeking to injure composers. We want to pay fully and fairly for the music we use. We don't feel we should pay for all the music ever written.

As you have heard over and over, we are forced to obtain music rights by means of a blanket license. These blanket licenses convey not only the copyright to the music actually inserted by the Hollywood studios into their shows, but to each and every copyrighted song controlled by ASCAP and BMI. We have no power to shop around, no power to select what we pay for. We pay on the basis of an industrywide formula which treats every station exactly the same.

This system was developed for the live music era of vaudeville theaters and dance halls. It has no relevance to television today. It has no relevance to movies. In fact, it was abolished for movies shown in theaters nearly 40 years ago.

Mr. Chairman, movies have become a staple of independent television. In fact, stations like mine exhibit more movies than movie theaters. Yet the movie theater owner receives a source license. He gets the right to the music in the movie he exhibits in the very same transaction in which he receives the other performance copyrights in the film. Yet when that same can of film crosses the street to my television station, we are told that it is no longer possible to sell the music rights. Mr. Chairman, that just doesn't make sense.

If I want to get a price for music other than that in ASCAP's blanket license, I am told to go to the rate court in New York, but, Mr. Chairman, the rate court which is supposed to reign in ASCAP's monopoly power has never decided a case in 37 years of existence. The current proceeding involving all local television stations is already nearing the end of its third year, and the trial has not even begun. When that proceeding is completed sometime in the 1990's, the result will still be a nationwide rate for music which will treat my station just like every other station in the country and force us to license all the music ever written.

Mr. Chairman, all we seek is the right to pay for what we use. We believe that is all copyright owners have a right to expect under our Nation's copyright law. That is what will happen when S. 698 is enacted.

I would now like to introduce Mr. "Pep" Cooney.

[The prepared statement of Mr. De Angelis follows:]

Testimony of Richard DeAngelis
Representing the Association of Independent Television Stations
INTV

SUMMARY

The Association of Independent Television Stations (INTV) has 177 member stations, none of which receives programming from a major network. Twenty-three (23) INTV stations are currently in bankruptcy.

The ability to bargain with sellers of program copyrights is vital to independent stations' ability to survive. Program costs -- largely for syndicated programming -- account for 50% of total expenses for the typical independent.

The music in a syndicated show is the only copyrighted element in a program a station can't bargain for directly with the studio/producer. Stations are forced to buy blanket licenses under a formula that treats every station the same. This system was developed for the era of dance halls and vaudeville houses, not for modern television. It was discarded for movies shown in theaters 40 years ago.

Movies shown in theaters are source licensed. Movies on TV are blanket licensed. There is no logical reason for the difference except that television has the theoretical alternative of a "rate court" procedure which has never been utilized successfully in 37 years. A current proceeding is now in the third year and has not yet even reached the trial stage. The rate court is a form of regulation too complicated to work. It is an illustration of the problem rather than the solution.

All independent stations seek is the right enjoyed by all other copyright purchasers, to bargain and pay for what they receive.

* * *

Mr. Chairman, thank you for the opportunity to present our case to you this morning. I am appearing on behalf of the Association of Independent Television Stations, usually known as INTV. INTV is a voluntary association representing the Nation's Independent television stations. Our stations operate without the benefit of programming supplied by ABC, NBC or CBS.

The Independent stations must fill every minute of our program day with programs we produce ourselves -- such as news, public affairs and sports -- or we must go to the Hollywood program market and buy movies and syndicated programs. We operate in the free market. We do not enjoy any special copyright subsidies or privileges such as the cable compulsory license or the statutory license now being proposed for the backyard dish industry.

This means that we are among the most copyright-dependent industries in the Nation. Please remember that what we buy from Hollywood are nothing more than public performance copyrights.

Ours is a rough and highly competitive business. INTV currently has 177 member stations. In the last year alone 23 Independent stations -- a number equal to 13% of our entire membership -- were forced into bankruptcy proceedings

Stations like mine, without the security -- or sameness -- of network programs, account for much of the diversity which exists in television today. It is we who offer the alternatives in free television -- alternatives such as expanded news and public affairs, sports and religious programming of local interest as well as a vast array of Hollywood programming in the form of movies and syndicated shows.

The ability to bargain with sellers of programming on a case-by-case basis is vital to my station's ability to stay in business. If I pay more for performance rights than I receive in advertising dollars, I will go out of business. In fact, excessive program costs are the principle cause of the 23 bankruptcies in Independent television. According to the latest surveys, program costs account for approximately 50% total expenses for the typical Independent station. Because of this, I, like any other businessman, must make hard choices. If I spend more for one Hollywood product, I may have less to spend for another. It is this process of making hard decisions in an open market which results in diversity among stations and is the essence of our business. It is also what the copyright law is all about.

Let me be clear about one thing. The Independent stations are not seeking to injure composers. We want to pay fully and fairly for the music we use. However, all that copyright owners normally receive from their congressionally-granted powers is the right to bargain in the free market for the use of their artistic creation. Buyers *value* each individual work by paying "what the market will bear."

Not so for music copyright, however.

As you have heard over and over, we are forced to obtain music rights by means of a blanket license. These blanket licenses convey not only the copyright to the music actually inserted by the Hollywood studios into their shows -- but to each and every copyrighted song controlled by ASCAP and BMI. We have no power to shop around, no power to select what we pay for. We pay on the basis of an industry-wide formula which treats every station exactly the same.

This system was developed for the live music era of vaudeville theaters and dance halls. It has no relevance to television. It has no relevance to movies. In fact, it was abolished for movies shown in theaters nearly 40 years ago.

Mr. Chairman, movies have become a staple of Independent television. In fact, stations like mine exhibit more movies than movie theaters. Yet, the movie theater owner receives a *source* license. He gets the right to the music in a movie he exhibits in the very same transaction in which he receives the other performance copyrights in the film. Yet, when that same can of film crosses the street from the local movie theater to my television station, we are told that it is no longer possible to sell the music rights. Mr. Chairman, that just doesn't make sense.

If I want to get a price for music other than that in ASCAP's blanket license, I am told to go to the "Rate Court" in New York. But, Mr. Chairman, the so-called rate court -- which is supposed to rein-in ASCAP's monopoly power -- has never decided a case in 37 years of existence! The current proceeding, involving all local television stations, is already nearing the end of its third year and the "trial" has not even begun. When that proceeding is completed some time in the 1990's, the result will still be a nationwide rate for music which will treat my station just like every other station in the country, network affiliate or independent.

Mr. Chairman, all we seek is the right to pay for what we get. If we choose to use our scarce dollars on an expensive program with expensive music in the hope that it will attract viewers and generate advertising revenue, we will pay more for music. If we choose to buy a program with little or no music, the music portion of our payment will be less if S.698 is passed. The point is that the decision will rest on the quality of the individual copyrighted work involved. We believe that is all copyright owners have a right to expect under our Nation's copyright law. That is what will happen when S.698 is enacted.

* * *

BIOGRAPHICAL DATA

Richard De Angelis
KPHO-TV

In 1966 Dick began his career in broadcasting as a sales representative for WGRT-TV in Flint, Michigan. The in 1968 he joined Meredith Corporation as Local Sales Manager at WNEM-TV in Flint, Michigan, and in 1972 was promoted to General Manager at WNEM. Then in 1978 he became Vice President & General Manager at KPHO-TV, Meredith's Phoenix base independent.

Senator DECONCINI. Mr. Cooney.

STATEMENT OF C.E. "PEP" COONEY, KPNX-TV, PHOENIX, AZ

Mr. COONEY. Thank you.

Mr. Chairman and members of the committee, thank you for the opportunity to appear here today on behalf of music copyright reform. Eighteen months ago this same subcommittee in the 99th Congress held a hearing on a bill similar to S. 698, also introduced by Senator Thurmond. Because of the record produced by that hearing, we do not feel that it is necessary to begin at square one and explore in detail all aspects of the TV music licensing morass.

What we would like to accomplish today is to bring you up to date on what we as broadcasters have tried to do since the last hearing to resolve the problems addressed by Senator Thurmond's bill, and to do that without legislation. Unfortunately, our experience in the last 1½ years has confirmed to us the sad fact that only congressional intervention can right the wrongs currently suffered in circumstances where the current copyright law has allowed the Hollywood studios to fleece the local television broadcasters to the tune of tens of millions of dollars a year.

In telling our story, we have decided to speak in part to you, the subcommittee, through the medium we know best, the medium that is at the center of the issue before you today, television. Here to tell you that story is a videotape narrated by Les Arries, who will also do a brief wrapup at the end of the tape.

As Warner Wolfe would say, let's go to tape.

Senator DECONCINI. OK.

STATEMENT OF LESLIE G. ARRIES, JR., BUFFALO BROADCASTING CO., BUFFALO, NY

Mr. ARRIES. In 1986 the All-Industry TV Music License Committee testified before the 99th Congress on blanket versus source licensing of television music. Opponents of licensing reform used the hearing to misrepresent a simple and straightforward issue: do the television stations of America have the ability to pay for only the music actually used in the syndicated shows and movies sold to them by Hollywood, and is there a means of paying fair value directly to the studios that provide the music? The present law does not make this possible, so we have to turn to Congress.

Article I, section 8, of the U.S. Constitution gives Congress the sole authority to determine the scope of powers to be granted to copyright owners. Over the last 200 years Congress has molded the contours of the copyright law to insure balance, equity, and fairness in the copyright system. That is what we are seeking now.

We have tried to resolve the problem without legislation, but our efforts to negotiate with ASCAP were not met in good faith. On April 9, 1986, the president of ASCAP made the following two statements to the Senate Subcommittee on Patents, Copyrights and Trademarks.

> They say they want to be free to reject a blanket license when a limited amount of music is used on locally originated programs. They already can.
>
> What do broadcasters really want? They really want our music without paying for it.

The record of the 18 months since the hearing has proven both of those statements wrong.

When on July 28, 1986, ASCAP's new president issued an invitation to us to sit down and settle our differences, we were eager to see if, finally, there was substance to ASCAP's claim that we were "free to reject a blanket license. * * *"

After 13 months of meetings and countless hours spent preparing for those meetings, it was apparent that ASCAP would not meet, even halfway, our pleas for reform. We asked them for an alternative to blanket licensing. They balked. But we persisted and ASCAP's negotiators grudgingly agreed to discuss a per-program license.

The advantage of such a license is that TV stations could pay for music based on its actual use and market value. Fees would be paid to ASCAP only for those programs in which ASCAP music is actually used. Also, a per-program license would allow TV stations to negotiate directly with composers for the rights to the music in locally produced programs and not pay ASCAP separately for those same rights, thus opening the music market to competition and getting away from the "all or nothing" concept of the blanket license.

It was soon apparent that ASCAP simply could not sell any meaningful reform of per-program licensing to its board of directors. A meaningful license is one which would enable television stations who use very little ASCAP music to pay fairly and enable those stations prepared to pay additional music license dollars to reduce commensurately their blanket license fees.

But ASCAP demanded a guarantee. If a TV station used so much as one note of ASCAP music in one program in a 1-month period, that station would have to pay a minimum fee equal to 75 percent of what it was charged under the blanket license, irrespective of how much money that station might have shelled out in direct payment to acquire those same music rights.

The futility of the per-program discussions forced us to seek a more equitable blanket license. We emphasized at the bargaining table that it was untrue that we wished to pay nothing, as ASCAP had alleged at the Senate hearing. We merely wished to pay for what we were receiving from ASCAP that had value to us—that is, the composers' scores that were incorporated in the programming sold to us by the Hollywood studios and syndicators.

Since composers will receive only $24 million of the $60 million we television stations are currently paying to ASCAP, we suggested structuring the blanket license fees to reflect that value. Our position pointed out the fact that, although the studios receive as much as the composers from ASCAP, we receive no benefit from their publishing services and that ASCAP's 20-percent charge for administration is extremely expensive when compared to the overhead associated with administering royalty payments to writers, directors, and others, which is currently about 4 percent.

We even assembled and presented to ASCAP statistics on what screenwriters and directors have been receiving for their contributions to syndicated TV shows. We pointed out that while directors have received $27 million and screenwriters $37 million annually in royalties, ASCAP and BMI have collected some $100 million.

The contribution of most artists working on a television series is weekly: the director directs each episode; the writer comes up with a new script every week; the choreographer creates new dances for each episode. A composer usually creates one theme and perhaps some background music which are then used every week. "Jeopardy" and "People's Court" are 2 of the top 15 shows in syndication; yet, they use very little music, often just a theme. In that respect, a $24 million payment to composers seemed reasonable, although we would prefer to make that payment through the same kind of residual system used by other artists and provided for in S. 698.

We offered to pay $48 million the first year descending to $40 million in the fifth year. We felt that if ASCAP were truly willing to negotiate structural reform, its negotiators would at least discuss the new formulation of a blanket license. ASCAP's response? "No way." Its negotiators insisted on an annual fee of $63 million which meant an increase over what the industry is currently paying. Eventually, ASCAP did say they would give us a $2.5 million discount off the first year's payment. Of course the payments would still rise each year after that.

What we have just related is what ASCAP really meant when it said that all television stations needed to do to change the system was to ask them. We can only conclude that ASCAP's only purpose in pursuing negotiations was to deflect efforts at legislative reform. It is regrettable that we must again turn to Congress for reform.

[End of video narration.]

Mr. ARRIES. Mr. Chairman——

Senator DECONCINI. Yes, sir, Mr. Arries?

Mr. ARRIES [continuing]. And members of the subcommittee, thank you for hearing our plea.

Senator LEAHY. Mr. Chairman, may I just interrupt for a second?

Senator DECONCINI. Yes.

Senator LEAHY. We've heard the plea, but it was made at the level that you would have for children watching "Sesame Street." I came here to hear live people testify, not to see something that was aimed for 10-year-olds.

I think there are good reasons to have video presentations in certain areas, and this is not in any way a reflection on your position. I don't have a position. I came to these hearings to learn. But something like that is something that we show 5-year-olds on "Sesame Street."

Mr. ARRIES. Senator, we felt it was important to make clear——

Senator LEAHY. Important to make sure you could show the logos of the TV stations in each of the home towns of the various members of this committee. That's about all it looked like to me.

Mr. ARRIES. We wanted to make sure that this subcommittee that we had made every effort since the last hearing——

Senator LEAHY. Fine; then tell us. Tell us, but don't run a video that's designed just to make sure that we know that the logos of our local TV stations have been shown on the TV screen.

I'm sorry, Mr. Chairman.

Senator DECONCINI. While the Senator from Vermont has the floor, do you have any opening statement you'd care to make?

Senator LEAHY. No. I know that we are busy on this and I know that time is limited, so I won't. I think that the issue is important. The parties on both sides should be heard. Each side has some very legitimate points to make. Mr. Arries, I want you to understand I feel very strongly about that.

I compliment you in having these hearings.

Senator DECONCINI. Mr. Arries, please continue.

Mr. ARRIES. I want to leave you with just a few thoughts. First, I hope you will understand that our fight is not with composers; it is not over whether we should pay for copyrights. It is simply over a system that forces us to pay giant Hollywood studios through their music publishing arms and a bloated ASCAP bureaucracy a surcharge of $1.50 for every dollar that goes into a composer's pocket.

Second, we have no apologies for asking you to approve Senator Thurmond's source licensing bill, S. 698, as it is currently written. However, we earnestly desire an end to the strife which presently encumbers our Nation's music copyright system. We pledge to work with you to develop any reasonable solution which will bring about our copyright law into harmonious balance between the music creator and we the users of that creativity.

We believe very strongly that there is a structural problem in the copyright system and only the Congress can correct that.

Thank you.

[The prepared statement of Mr. Cooney and Mr. Arries follows:]

STATEMENT OF LESLIE G. ARRIES
AND
C.E. COONEY
ON BEHALF OF
THE ALL INDUSTRY TV MUSIC LICENSE COMMITTEE

SUMMARY

The All-Industry TV Music License Committee represents over 900 local commercial television stations in the United States.

Television stations want the ability to pay for music actually used in syndicated shows and movies sold to them by Hollywood, and a means of paying fair value directly to the studios that provide the music. The present copyright law does not make this possible.

Only Congress can correct the problem. Extensive non-legislative efforts by broadcasters have proven fruitless. ASCAP/BMI and Hollywood won't voluntarily limit their copyright monopoly.

Broadcasters spent 13 months in 1986 and 1987 attempting to negotiate a fair solution with ASCAP. ASCAP refused to offer either a usable per-program license or a fair blanket license.

ASCAP insisted that each station guarantee them 75% of what ASCAP now receives under the blanket license if as little as one note of ASCAP music was used in one month under a per-program license.

When no progress was made in negotiating a per-program license, broadcasters suggested a new formula which would guarantee enough money to pay composers at current rates under a blanket license. Broadcasters insisted, however, that studio "publishing" fees (currently 40%) and ASCAP administrative charges (currently almost 20%) be reduced. ASCAP balked and proposed an increase in all fees charged to broadcasters.

Broadcasters have no argument with composers. They object to a copyright system which forces them to pay Hollywood producers and a bloated ASCAP bureaucracy $1.50 for every copyright dollar that goes into composers' pockets.

* * *

Mr. Chairman and members of the Committee. Thank you for the opportunity to appear here today on behalf of music copyright reform.

Eighteen months ago this same Subcommittee -- in the 99th Congress -- held a hearing on a bill similar to S.698, also introduced by Senator Thurmond. Because of the record produced by that hearing we do not feel that it is necessary to begin at square one, and explore in detail all aspects of the TV music licensing morass. What we would like to accomplish today is to bring you up to date on what we as broadcasters have tried to do since the last hearing to resolve the problems addressed by Senator Thurmond's bill and to do that _without_ legislation.

Unfortunately, our experience in the last year-and-a-half has confirmed to us the sad fact that only congressional intervention can right the wrongs currently suffered in circumstances where the current copyright law has allowed the Hollywood studios to fleece the local television broadcasters to the tune of tens of millions of dollars a year.

In telling our story we have decided to speak in part to you, the Subcommittee, through the medium we know best -- the medium that is at the center of the issue before you today -- television.

In 1986, the All-Industry TV Music License Committee testified before the 99th Congress on blanket versus source licensing of television music. Opponents of licensing reform used the hearing to misrepresent a simple and straightforward issue: The ability of television stations to pay for _only_ the music actually used in the syndicated shows and movies sold to them by Hollywood, and a means of paying fair value directly to the studios that provide the music. The present law does not make this possible, so we turn to Congress.

Article I, Section 8 of the U.S. Constitution gives Congress the sole authority to determine the scope of powers to be granted to copyright owners.

Over the last 200 years Congress has molded the contours of the copyright law to ensure balance, equity, and fairness in the copyright system. That is what we are seeking now.

We have tried to resolve the problem without legislation, but our efforts to negotiate with ASCAP were not met in good faith. On April 9, 1986, the President of ASCAP made the following two statements to the Senate Subcommittee on copyright:

> "They say they want to be free to reject a blanket license when a limited amount of music is used on locally originated programs. They already can."
>
> "What do broadcasters really want? They really want our music without paying for it."

The record of the 18 months since the hearing has proven both of those statements wrong.

When, on July 28, 1986, ASCAP's new president issued an invitation to us to sit down and settle our differences, we were eager to see if, finally, there was substance to ASCAP's claim that we were "Free to reject a blanket license"...

After 13 months of meetings and countless hours spent preparing for those meetings, it was apparent that ASCAP would not meet, even half way, our pleas for reform. We asked them for an alternative to blanket licensing. They balked. But we persisted and ASCAP's negotiators grudgingly agreed to discuss a per-program license. The advantage of such a license is that TV stations could pay for music based on its actual use and market value. Fees would be paid to ASCAP only for those programs in which ASCAP music is actually used. Also, a per-program license would allow TV stations to negotiate directly with composers for the rights to the music in locally-produced programs and not pay ASCAP separately for those same rights, thus opening the music market to competition and getting away from the "all or nothing" concept of the blanket license.

It soon was apparent that ASCAP simply could not sell any meaningful form of per-program license to its board of directors. A meaningful license is one which would enable television stations who use very little ASCAP music to pay fairly and enable those stations prepared to pay additional music license dollars to reduce commensurately their blanket license fees. But ASCAP demanded a guarantee. If a TV station used so much as one note of ASCAP music in one program in a one-month period, that station would have to pay a minimum fee equal to 75% of what it was charged under the blanket license, irrespective of how much money that station might have shelled out in direct payment to acquire those same music rights. The futility of the per-program discussions forced us to seek a more equitable blanket license. We emphasized at the bargaining table that it was untrue that we wished to pay nothing, as ASCAP had alleged at the hearing. We merely wished to pay for what we were receiving from ASCAP that had value to us -- the composers' scores that were incorporated in the programming sold to us by the Hollywood studios and syndicators.

Since composers will receive only $24 million of the $60 million we television stations are currently paying to ASCAP, we suggested structuring the blanket license fees to reflect that value. Our position reflected the fact that, although the studios receive as much as the composers from ASCAP, we receive no benefit from their "publishing services" and that ASCAP's 20% charge for "administration" is extremely expensive when compared to the overhead associated with administering royalty payments to writers, directors, and others, which is currently about 4%.

We even assembled and presented to ASCAP statistics on what screenwriters and directors have been receiving for their contributions to syndicated TV shows. We pointed out that while directors have received $27 million and screenwriters $37 million annually in royalties, ASCAP and BMI have collected some $100 million.

The contribution of most artists working on a television show package is weekly: The director directs each episode, the writer comes up with a new script every week, the choreographer creates new dances for each episode. A composer usually creates one theme and perhaps some background music which are then used every week. Jeopardy and People's Court are two of the top 15 shows in syndication, yet they use very little music, often just a theme. In that respect, a $24 million payment to composers seemed reasonable, although we would prefer to make that payment through the same kind of residual system used by other artists and provided for in S.698.

We offered to pay $48 million the first year descending to $40 million in the fifth year. We felt that if ASCAP were truly willing to negotiate structural reform, its negotiators would at least discuss the new formulation of a blanket license. ASCAP's response? "No way." Its negotiators insisted on an annual fee of $63 million which meant an increase over what the industry is currently paying. Eventually, ASCAP said they would give us a $2.5 million discount off the first year's payment. Of course, they said, the payments would still rise every year after that.

What we have just related is what ASCAP really meant when it said that all television stations needed to do to change the system was to ask them. We can only conclude that ASCAP's only purpose in pursuing negotiations was to deflect efforts at legislative reform. It is regrettable that we must again turn to Congress for reform.

Mr. Chairman and members of the Subcommittee. Thank you for hearing our plea. I want to leave you with a few thoughts.

First, I hope you will understand that our fight is not with composers; it is not over whether we should pay for copyrights. It is simply over a system that forces us to pay giant Hollywood studios and a bloated ASCAP bureaucracy a surcharge of $1.50 for every dollar that goes into a composers' pocket.

Second, we have no apologies for asking you to approve Senator Thurmond's source licensing bill, S.698, as it is currently written. However, we earnestly desire an end to the strife which presently encumbers our Nation's music copyright system. We pledge to work with you to develop any reasonable solution which will bring our copyright law into harmonious balance.

* * *

Biographical Information on
Leslie G. Arries, Jr.

Leslie G. Arries has served as the Chairman of the All-Industry Television Music License Committee for more than 15 years.

He is currently President and Chief Executive Officer of television stations in Buffalo, New York, and Columbus, Ohio. With over 40 years of experience in television, Mr. Arries has served as general manager of six stations. He has held jobs as an engineer, network director, assistant director of programming and production for the former DuMont Television Network, general manager of six stations, and as sales representative for CBS television.

He has held responsible positions in the television production industry as well as broadcasting. He served as president of Westinghouse Productions which produced the Mike Douglas and Merv Griffin shows, and as president of the company syndicating those programs and others.

* * *

BIOGRAPHICAL DATA

C. E. "Pep" COONEY
KPNX-TV

Born in Council Bluffs, Iowa. Graduated from Thomas Jefferson High School/1951, Council Bluffs, Iowa. Attended University of Nebraska (Omaha) Majored in Business

Administration. Attended University of Utah (Salt Lake City)- Majored in Marketing-Advertising. Attended University of California Extension, San Francisco Majored in Management and Labor Relations.

Cooney has a wide background in Sales and Marketing/Advertising, in addition to his broadcast experience. Began his career in an advertising agency; went on to National Advertising Co., and the Independent Television Corporation before joining KRON-TV, (San Francisco) in 1960 as an Account Executive, later as Sales Manager, General Sales Manager and Station Manager, Vice President, and finally President and General Manager. His editorials at KRON-TV earned several Emmy Awards.

Cooney joined KPNX-TV (formerly KTAR-TV) as President and General Manager in March 1977. Cooney is very active in civic, business, and professional organizations, as follows:

Past Associations:
Valley Big Brothers Board of Directors
Past President, Arizona Broadcasters Association
Board of Directors, Metropolitan Phoenix Broadcasters
United Way - Campaign Chairman 1981/82
Fiesta Bowl Chairman - 1982
Phoenix and Valley of the Sun Convention & Visitors Bureau, Chairman 1983
Arizona Country Club Board of Directors
Arizona Country Club Membership Chairman
Samaritan Medical Foundation Board of Directors
Samaritan Health Services Board of Directors
Governor's Advisory Committee on NFL Football
American Red Cross Board of Directors
Fiesta Bowl Board of Directors, 1979/80/81/82/83/84/85/86/87
Fiesta Bowl Gen'l Chairman, 1984
St. Luke's Hospital Medical Center - Public Relations Committee
Citizens Bond Committee
Board Member, Nat'l Academy of Television Arts and Sciences
Samaritan Golf Ball - Chairman/1983/84, Vice Chrman 1984/85
NBC Board of Affiliates
Valley Leadership Board of Directors.
Chairman, NAACP Freedom Fund Dinner 1986
Phoenix Chamber of Commerce Bd. of Directors & Executive Committee
Phoenix and Valley of Sun Convention and Visitors Bureau, Board of Directors and Executive Committee
General Program Chairman, Rotary 100

Current:

NBC Affiliates Sports Committee
NBC Affiliates Sports Olympic Committee Chairman
Plaza III Fashion Merchandising Institute Advisory Board.
U. S. Savings Bond - Chairman. Maricopa County
NBC Affiliates Sports Committee-Vice Chairman
Great American First Svgs & Loan Board of Directors; GAFSLA Marketing Advisory Committee Chairman
KPNX Minority Advisory Board
Theodore Roosevelt Council, Boy Scouts of America, Executive Board and Chairman, Endowment Development Committee
Mayor's Professional Sports Advisory Committee
First Amendment Coalition Board of Directors; Treasurer 1986/87
Governor's Motion Picture and TV Advisory Board
National Conference of Christians and Jews, Bd. of Directors
Fiesta Bowl Board of Directors/Executive Committee/Team Selection Comm. 1986/87
Citizen's Bond Oversight Committee
Chairman, Walter Cronkite/ASU Endowment Foundation 1986/87
Advisory Board, Arizonans for NFL

Cooney received the Distinguished Citizen Citation from Phoenix Union High School District All City Honors Convocation in May of 1986.

Cooney is an avid golfer and sports enthusiast. Cooney and his wife (Cheri) have two sons and two daughters and reside in Phoenix. All family members are active in the sports areas of golf, tennis, skiing, swimming, and gymnastics.

Senator **DeConcini**. Thank you.

Mr. Cooney, do you have further remarks?

Mr. **Cooney**. No, sir.

Senator **DeConcini**. That's it?

Gentlemen, I have a number of questions. I'm going to just start off with one that is an alternative. One of the problems this Senator faces is the point that Senator Wilson made: if it really isn't broke and there are other alternatives, why should Congress get involved? My philosophy or approach is that we are here as a last resort when there is a great disparity in the market, and that to me has to be brought forward.

I listened to your testimony, and I can see the plight you're in without any problem, because you're paying—from your point of view—paying for a lot that you don't use and when you need one piece of music, you have to buy the whole package.

What if—and I'll let whoever wants to answer or all of you—what if you went directly to a composer for the music for one of the shows that you have, say, Mr. De Angelis, that you've contracted for and you made a deal with that composer, whatever it is, blanket or percentage or whatever for the music? Obviously when you have to pay a percentage to BMI and ASCAP, you don't save any money. What if any money that you paid to that composer was deducted from what you had to pay to BMI under your blanket licensing? How would that approach—how would the industry approach such a proposal?

Mr. **De Angelis**. Senator, I can only answer that hypothetical question in this fashion: currently, if I were to negotiate the rights for the music performances with a studio producer, I would still have to pay the same ASCAP, BMI, and SESAC fees——

Senator **DeConcini**. Yes, I understand.

Mr. **De Angelis**. So there is no measure to carve out those fees under the present system.

What you're proposing is something that could be considered if it really would result in a system of our paying for what we use. We have no objection to paying for what we use. We do object to paying for what we don't use.

Senator **DeConcini**. Well, I guess the question, then, is leaving a blanket license in the provision as it is now, but if there was legislation that indicated that any direct negotiations you had for the source, those fees were deducted from what you paid under the blanket license?

Mr. **Cooney**. No. In fact, they are paid over and above because——

Senator **DeConcini**. I know. I know they are. My point is, how does that strike you as an alternative?

Mr. **Arries**. Might I just add, Senator, if I may break in there—in most cases, in many cases at least, the composer has given over the copyright in a music-for-hire situation to the Hollywood producer. So we have no way of going to that person to get that music.

Senator **DeConcini**. Well, let's assume that you find one out of several hundred thousand composers who has not given away or deeded over or transferred over all the rights. So you've got a hypothetical here, and I realize it's hypothetical. The guy or the lady is a composer and they belong to BMI or ASCAP, and you have a show that they wrote the music for. Now you're under a blanket license with both those associations.

You go to that individual and you say, "Look, I want to buy a right to your music, to show this show for a year because that's what I've got a contract for."

And they said, "OK, this is how much I want."

And you say, "We're willing to pay that."

Now what if the law said that, upon proof that you paid the composer, that that amount of money would be deducted from the blanket amount of money that you had to pay to BMI and ASCAP?

Mr. **Lombardo**. Senator, I, for one, would think it would be a step in the right direction. Beyond that, I'd like us to focus on where the distribution of that total dollar goes. I don't see what the value added is when 40 percent of that dollar goes to publishing houses that give me nothing; they just publish nothing for me—nor 20 percent of it that goes to a bureaucracy to administer distribution.

Senator **DeConcini**. Let me just tell you how that hits me. Is it up to us to decide that market question of how it goes? Is it up to me to tell you how much you should pay labor, how much you should pay for your programming that you buy? I don't think so.

Mr. **Lombardo**. No, but——

Senator **DeConcini**. It seems to me the marketplace is there. What I'm trying to find is some way that you could use an alternative basis. It seems to me one of the arguments here is that there are four ways to go, but, in essence, what you tell us is there really is only one, and it seems pretty clear——

Mr. **Lombardo**. That's correct.

Senator **DeConcini** [continuing]. From our past hearings that there really is only one, and that's dealing with these associations.

So now for you to ask me to get in there and say, "Gee, they spend 20 percent for this and 40 percent for that"—well, I'm not prepared to say that's out of line; I don't know. But I am prepared to consider some alternative where you can use another one of these four alternatives, and that's why I asked the question.

Mr. **Cooney**. In reality, there may be four different ways possibly the fees could be paid. There's the blanket which we are practicing today; there's the source; and there's the direct; and there's the per-program. In reality, we are just using one.

Senator **DeConcini**. Right.

Mr. **Cooney**. Now we are looking for alternatives. We're using one and somewhat of a direct pay because from time to time we do pay the composer directly when we use it locally for local news or local sports or community affairs programming.

What we're here for—the opponents to bill S. 698 will say, "Why don't you just take it to the rate court and let them decide this?" That's not the point. That will settle the rates.

We are trying to talk about the principle of how we pay and who gets the pay, and basically how the composers are taken care of in this.

Mr. **Arries**. Senator, if I might make two points: Mike Post testified, and he will testify again today, but Mike Post indicated the last time he testified that the last thing he wanted to do was sit down with 200 television stations in 200 different markets and negotiate the music. It prevents him from creating music, which is what earns him money, and he certainly doesn't want to take the time to do that.

Senator DECONCINI. But you're begging my question because what Mike Post wants to do, whether or not he wants to do it—he doesn't have to; he can say no. "Hey, guys, I'm not going to deal with you."

My point is that if you had that alternative where you got a credit for dealing with Mike Post—say all of the sudden he just likes you and he says, "Well, I don't want to deal with 200 stations, but, by gosh, your station I'll deal with. You're a nice guy and I'll deal with you."

So you make a deal with him and he gets a lot of money for it, and now you get to deduct that from the BMI payment you have to make. Now how does that—does that work, assuming under that hypothetical that arrangement could be made with Mr. Post or with someone else.

Mr. ARRIES. That begins to work toward the goal of what we want to do, which is to pay for the music in an individual program for what it's worth for our marketplace.

Senator DECONCINI. OK. Now have you discussed that or has that been part of your negotiations with BMI or ASCAP?

Mr. ARRIES. We have talked about it, a reasonable per-program license which would——

Senator DECONCINI. No, have you negotiated or discussed the scenario that I just laid out to you where it wasn't per-program but it was a credit for any contract you made directly with the composer?

Mr. ARRIES. We have talked about carve-outs, yes.

Senator DECONCINI. You have?

Senator LEAHY. I'm sorry, I didn't hear the answer.

Mr. ARRIES. What we call "carve-outs."

Senator LEAHY. Oh, yes.

Senator DECONCINI. And what's been the attitude of the associations? They don't want to do that, I suspect.

Mr. ARRIES. They do not. That was their—they want to put a floor of 75 percent from the blanket license. So that we pay no——

Senator DECONCINI. They would go down 25 percent based on that kind of a credit situation?

Mr. ARRIES. Yes, but they want to limit it to no more than 25 percent.

Senator DECONCINI. Well, wouldn't that be a good place to start?

Mr. ARRIES. I guess that we could go in that direction, but the problem here, as you saw from our videotape, the magnitude of what we're paying for music creativity versus what we pay for the other creativity is so out of line that this doesn't give us the kind of relief——

Senator DECONCINI. I understand, and you've got a point: that you're buying—you're paying for a lot that you don't get, and that does smack of some unfairness. But when you deal with these other three alternatives, it troubles me whether or not the composers—and let's put aside for right now the fact that some of them may work for big publishing companies that are owned by studios, although I understand we'll hear testimony that this isn't the case, although last year—or at least in the 1979 *Buffalo* case it certainly was at that time. But I'm trying to find some way to move toward perhaps a more equitable way without destroying the composers' legitimate place in the market.

As a matter of fact, I'm told that once upon a time your agreements had that, that you did get a credit. I don't know if there was a floor on it or not.

Mr. ARRIES. I believe that was with BMI which predates my relationship with the committee. You know, we've been working on this, Senator, and it's been characterized that the system works very well, but we've been working on this for 40 years, since the Voice of Alabama, trying to solve our problem. Now, obviously, if broadcasters have been fighting this battle for over 40 years, it isn't working very well.

I really think it's important to get a picture of what we're talking about as far as composers are concerned. We're talking about 15 percent of all of the composers—there are some 57,000 composers between ASCAP and BMI, and we're talking about 15 percent of those that get any money in syndication and we're talking about 75 percent of that money is paid to only 780 people. That's a very exclusive club—not quite as exclusive as the one you're in, but it's a very exclusive club.

Senator DECONCINI. It may be easier to get into; I don't know. [Laughter.]

Let me just pursue that a little bit because what I think you're saying is that so many of these composers are under contract with a publishing company; is that what you're telling me?

Mr. ARRIES. That's true.

Senator DECONCINI. Most of them?

Mr. ARRIES. Yes.

Senator DECONCINI. Consequently, they get paid a salary, and their job is to write music for whatever show they're going to be contracted to write music for. So when you make your blanket payment, that payment goes to the publishing company and doesn't really get distributed to that employee; is this correct?

Mr. ARRIES. That's correct.

Senator DECONCINI. Now if that's the case, and I take it from what you say—I have no reason to believe otherwise—but if that's the case, where does Congress get the right to interfere with that contractual determination that that composer decides he wants to do? He says to himself, "I'm a composer. I'm pretty good, but I'm tired of not knowing how much I'm going to get."

Here comes a publishing company that says, "Hey, we'll pay you *X* dollars."

"Hey, that's nice. I can live pretty well at this figure this year and I don't have to worry because I'm going to get paid an annual salary for everything I write, and if they make more, fine; if they make less, fine."

Is Congress to get into that type of micromanaging the right of a composer to decide that he doesn't want to compete in the open market; what he wants to do is be a salaried employee, and he'll give his best just as anybody else who was a salaried employee?

Mr. ARRIES. But you're asking us to protect that composer against this big, bad Hollywood producer. Now Mike Post will tell you that he not only gets his share of the copyright fee, he gets half of theirs. So he's not suffering in his ability to bargain with the Hollywood producers.

Senator DECONCINI. Well——

Mr. ARRIES. And——

Senator DECONCINI. But you're talking about a very renown gentleman who has the success, the wherewithal to employ a lot of help and assistance if he wants to or maybe make his own determination. I'm talking about some other composer. Maybe Mr. Post says, "I'd rather stay out of it." But even if it were Mr. Post, if he decided, "Hey, I'm just tired of this. What I want is a salary. I want to work from 9 to 5 for a while because I'm raising a family and I don't want to just be all the time doing that." If that were his judgment, should we say, "Hey, no, you can't make that contract with somebody?"

What if they made it with you? What if you were the publishing company and you got them to work for $200,000 a year; whereas, if they worked on the BMI or ASCAP approach, maybe they'd make $400,000 but they'd have to work harder maybe, or maybe they wouldn't. But I find some problem there of managing somebody who's an artist. You can't give up your right to go and be very prolific and deal on your own through your association; you can't contract with somebody. It just doesn't seem very fair.

Yes?

Mr. LOMBARDO. The only point I was going to make is, Is it really fair to the composer when his fellow creative community, the scriptwriters and the directors, do get residuals beyond the upfront payment?

Senator DECONCINI. Just say that again. I'm sorry.

Mr. LOMBARDO. I said, Is it truly fair to the composer where his fellow creative community, the scriptwriters and the directors, not only get the upfront payment, but get residuals when their work is played over and over again into the future?

Senator DECONCINI. Well, that's a legitimate question.

Mr. LOMBARDO. One other point, Senator, that you were making earlier: you know, we're really talking fundamentally here about where the copyright is, and I think that is the purview of the Senate to determine if the copyright is in the proper place and being executed properly.

Senator DECONCINI. Well, you know, the Senate has authority over the labor laws of this country. We can put wage and price controls if we want to do so, if that is determined necessary. We could probably pass a law because you're under the interstate commerce laws and set that you can't pay more than this for wages, but how far do we go? You're asking us to get awfully involved, it seems to me. That's the reason I asked the first question, Isn't there a way where you get a credit so you can use another one of these other alternatives and not have to pay for the full blanket and then have to pay if you do decide to go to the source yourself and make a deal with the source yourself, because it seems to me the marketplace—you might be able to break this thing that you don't like so much if you want to pay enough and get enough of those composers to deal with you. Then if you get a credit, it seems to me not to be an imbalance in the market. That's just my observation.

Mr. DE ANGELIS. Senator.

Senator DeConcini. Yes.

Mr. De Angelis. If I may, sir—one of the problems that we have with that is that we are not in a position to determine what music is contained in a particular program. It is the program's producer that determines that. In many of these programs the music is incidental to the show and really doesn't have that great of a bearing on the success.

I would offer as an example—is the music really the driving force behind the Cosby show which is a very successful sitcom in today's world?

The individual stations have no determination regarding what goes into that creative process. So for us to be dealing directly with the composer at that point is not a practical solution. We deal with the representatives of the producer when it comes into the aftermarket, and that's where we basically pony up and pay a price for all the creative work, all the copyrighted work that went into that production.

So I think that there are some practical problems with what is being proposed and——

Senator DeConcini. Is it a fact that you cannot get that information? You don't know who the composers are and who the songwriters are?

Mr. De Angelis. Oh, no, it's done by the time it gets to us. We're really not in a position—it would be absolute chaos in our business if we had to individually negotiate with every composer, every director, every scriptwriter. It is not a practical, working system is what I am suggesting. The working system that is practical, that is fair market and free, is the system of our negotiating directly with the representatives of the producers.

Senator DeConcini. Yes.

Mr. Arries. And if we tried to for music rights fees, that syndicator would be down the street to our competition. If we were to say, we'll buy this but first we have to find out what we're going to pay for the music with the composers of that music. He would be down the street to the competition. Of course, if it's a valuable program product, we have no choice but to go ahead and take it as it is.

Mr. De Angelis. I might add, Senator, my increase in programming costs of 71 percent over the past 2 years—and they are enormous programming costs—is testimony to my being responsive to free market forces.

Mr. Cooney. Senator, you asked why should you be involved and intervene. Well, we have been fighting this for a long time and have virtually gotten nowhere. We are really asking for a structural reform and not just set some rates and whatever.

Earlier Ralph Oman mentioned $95 million. Our figures are around $100 million. Now we don't believe it's fair really that ASCAP receives $60 million of that $100 million. We don't believe it's fair that the studios and the publishers receive 40 percent of that. There's 20 percent of that for administrative costs and only the remaining 40 percent goes to the composers.

However, we don't really have anything to do with that. If the composers can live with that and feel that's fair for the studios to give them only that much, that's up to them—$24 million out of that batch. But what we're saying is—and we also don't believe it's fair that only 15 percent of all the composers in the country are reaping any return on that; 85 percent virtually receive zero.

Senator DECONCINI. Isn't that up to them to do something about it?

Mr. COONEY. Well, I would think so.

Senator DECONCINI. Are you here to protect them? No, you're here because you've got a viable economic interest that you want to protect. That's true.

Mr. COONEY. Part of protecting them behooves us because of the quality and the proliferation of music that we would be using over the years. So we think they're a very important ingredient in this and——

Senator DECONCINI. Excuse me. I'm going to have to go on because I've taken far too much time. I yield to the Senator from Vermont.

Senator LEAHY. Thank you, Mr. Chairman.

I've read the testimony of the people here this morning. I try, when I read testimony, to put myself in your shoes. I can understand your concern, your frustration. You raise in my mind some fairly serious questions.

But I wonder, Mr. Cooney, if I might follow up on your response to the chairman's questions, because it really goes back to that whole issue of: If it ain't broke, why fix it? I'm sure you feel that it's "broke" and that's why you're here.

You've argued, all of you in one way or the other, that the blanket license system was developed for the era of vaudeville houses. But in 1984 in the Buffalo Broadcasting case the court concluded on what I understand is a very substantial record. I've only seen summaries of it; I don't know if there are too many people in this country who have gone through and read the whole record other than the lawyers involved in the litigation. But the court said the blanket license didn't violate the antitrust laws. They also said that any problem that exists could be resolved either in the marketplace or in the antitrust consent court.

Really the question with which we're faced is, why should Congress step in. I'm looking for this point: Why should we step in?

I stated at the outset—and I hope, as I mentioned to all of you, that my criticism of the tape isn't taken as a criticism of your testimony. Your testimony is extraordinarily important. I think on an issue such as this that the industry on both sides, the two industries represented here, have such strong feelings and there is such contention that I think you should be here to discuss it. I respect very much what you have said.

However, in the past if there has been any criticism of Congress, it's that we are constantly stepping in with legislation in an area where commercial interest, the free enterprise, free market system should involve itself. I'm sure that each one of you at one time or another run on your stations editorials saying that: Good God, keep Congress out of our affairs. Let us work these things out, for whatever industry you're dealing with.

So why? Why should we step in?

Mr. COONEY. I believe the *Buffalo* case really dealt with an antitrust, from the fact of, is ASCAP a monopoly. What we're saying is, sure, it's a system that's been used for 40 years- plus and it was designed around live television, but, Mr. Senator, tell me when was the last time you saw a live syndicated program? It's been a long, long time. They are all prerecorded and distributed——

Senator LEAHY. Or for us to hear live sound tracks anymore.

Mr. COONEY. So we know ahead what music is in a program. We could deal with a source on that. We think that the 40-year system is just archaic to the extent that it's not serving both parties fairly.

Senator, also, copyright law should be fair for user as well as creator.

Senator LEAHY. I agree.

Mr. COONEY. And the Congress has stepped in a number of times to adjust the copyright law to keep that balance proper. What we're saying here—and we've said it for a long period of time with a great deal of patience—the copyright law doesn't work for music on television, and it needs to be adjusted.

The fact that all of the other creative elements in the television show, their rights are not unbundled from the television program and set over here—it's like the story that I know because I personally said to you, when you buy an automobile and put the key in the ignition and the salesman says, "I'm sorry, Senator, you can't drive that out of here until you get a license from the carburetor association," and you say. "Well, why do I have to do that?"

"Well, we have all the rights for the tires and the fuel pump and the motors and the doors, but we don't have it from the carburetor association."

And you say, "Well, what is that going to cost me?"

He says, "Well, 2 percent of your last year's W-2 form. But if you do that, you can drive any car in America with that carburetor in it."

And then you say to him, "Well, who owns that carburetor association?"

You find out it's the very people that are selling you the car: Ford, General Motors, and Chrysler.

Senator LEAHY. We probably wouldn't buy any cars from them.

Mr. COONEY. Pardon?

Senator LEAHY. We probably wouldn't buy any cars and people would probably say the heck with it, "If that's the deal, if we've got to take a percentage of our W-2 form, we're not going to buy any cars." You'd see a heck of a reaction all over the country saying we won't buy cars.

Mr. COONEY. We pay regularly for the 4 million——

Senator LEAHY. I understand your point, but I'm just saying—I go back to what Senator DeConcini was asking: At what point do you stand up and say, "Look, we want it different. We'll join together to make it different?"

Mr. ARRIES. But when we license a show for our market with a Hollywood producer, why should he be able to go down the other side of the street and nick us a second time? We're paying him on a head-to-head negotiation, but in the music he has unbundled that right, put it over here in ASCAP and BMI, and now to get at that music in the very show that we want to play, we have to pay 2 percent of our gross revenue and buy 4 million titles to play the music in that very program.

How can that be fair?

Senator LEAHY. But how about—have you ever thought of using a combination of source licensing and say the ASCAP–BMI program license, use that as an alternative to blanket licensing? Would that work?

Mr. ARRIES. If we could get a per-program license that gave us that opportunity, but ASCAP has told us across the bargaining table that the most cutdown we can get from a blanket license, the most carve-out through using per-program, would be 25 percent. They want to put a floor of 75 percent of whatever the blanket license we would normally pay that we could not go below 75 percent.

Senator LEAHY. In preparing for this hearing, I asked people to give me a devil's advocate point of view on both your positions, yours and the next panel's. Somebody suggested that one possible solution would be to negotiate a blanket license that carves out any material that's been source licensed. Now, I understand that the BMI blanket license had such a carve-out provision in it, but it was dropped a decade or so ago because the broadcasters didn't want it anymore; is that correct?

Mr. ARRIES. I believe that was true. It predates my association with negotiations with BMI. So it's at least 15 years back.

Senator LEAHY. I understand. But wouldn't an adequate carve-out give you the ability, the economic incentive, to go out and use your market power to source license materials?

Mr. LOMBARDO. If there were no floor, Senator, that——

Senator LEAHY. I beg your pardon?

Mr. LOMBARDO. If there were no floor and the carve-out applied to everything, I think we have the beginning of a workable solution.

Mr. ARRIES. If we could get a per-program license on everything with the right to take that blanket license down to whatever developed, that would be fine, but ASCAP won't play that game.

Senator LEAHY. What impact would source licensing have on the cost of music?

Mr. ARRIES. As far as television stations are concerned, it's interesting because in the current syndication ratings, in the top 12 shows, "Jeopardy," "World Wrestling Federation," "Oprah Winfrey," "Great Sports Legends," "People's Court," "Entertainment Tonight," "Donahue," and "Hollywood Squares" are the top—there's only two that I left out: "Star Trek," where there is some music, and "Wheel of Fortune," where there is some music.

Senator LEAHY. Am I ever out of the mainstream. I don't know if I've ever seen any of those programs. [Laughter.]

Go ahead.

I think I'd better start paying attention to what people are watching then.

Mr. ARRIES. That's what America watches, Senator. There's no music in those shows that contribute to the success of them. Therefore, if I'm playing——

Senator LEAHY. I thought everybody watched the "Bob Newhart Show" because it's located in Vermont. I'm sorry. [Laughter.]

That's not a plug, I want to hasten to add.

I'm sorry, Mr. Arries. I think I cut you off. You were making a point.

Mr. **Arries**. I think it's very important for us to be able to pay for the music in a show directly and for the relative value of that music. In Mr. David's testimony, which he will read, a local TV station broadcasts a show with a song in it and should pay a performance fee for that right—that's exactly what we want to do. We don't want to have to buy 4 million titles that we don't play.

Senator **Leahy**. I understand your point.

If broadcasters pay 1 percent of their gross advertising revenues for blanket licensing fees, is that basically right?

Mr. **Cooney**. Two percent.

Senator **Leahy**. Two percent. I beg your pardon?

Mr. **Cooney**. It's closer to 2 percent.

Senator **Leahy**. Is it closer to 2 percent? Is this creating financial difficulties?

Mr. **De Angelis**. I represent the portion of the industry that seems to be having the greatest difficulty today, and that's the independent television stations which, by their very nature, rely on the Hollywood production community for the bulk of their programming. Our industry is in dire straits today. We have a number of stations in bankruptcy proceedings and there will probably be more continuing. So it's a fragile industry, and anything that throws out of balance the economics, particularly of smaller stations, we have problems.

Mr. Lombardo testified that his station pays in music licensing fees I believe almost as much, or perhaps more, than he does in his——

Senator **Leahy**. More than a news program, I believe your testimony said. I just want you to know I read the testimony, Mr. Lombardo.

Mr. **Lombardo**. Thank you, Senator.

Senator **Leahy**. So you paid more. Is that——

Mr. **Lombardo**. If I may hitchhike on that for just a second——

Senator **Leahy**. Sure. If you want to tell us how much that payment was, feel free, but you're not required to. I don't want you giving out any trade secrets.

Mr. **Lombardo**. I'd be happy to tell you. In 1987 the combined payments are approximately $123,000 for WVNY in Burlington, VT. As you know, I own the facility there that is disadvantaged as to UHF and UHF signals in mountainous terrain——

Senator **Leahy**. In a very mountainous State.

Mr. **Lombardo**. Don't go around mountains, so my signal reaches about half of what my competitors do. But, in spite of that——

Senator **Leahy**. I can't even get it in my own home and I'm only 25 miles away from your station.

Mr. **Lombardo**. That makes me very sad, but, in spite of that——

Senator **Leahy**. Me, too. Me, too, incidentally.

Mr. **Arries**. I recommend that you fix that, Phil.

Senator **Leahy**. No, no, no. There's nothing he can do about it because of the mountains, but I might say to Mr. Lombardo I am sorry about that because I think you serve a very useful purpose in giving some competition in that area.

Mr. **Lombardo**. As I'm sure you're aware, Senator, before I bought this station it had no news operation and I have put a news operation in. It's a small one. It consists of six full-time people, but to operate that news department costs me less than $120,000 a year. My payments for syndicates programming were less than $120,000 a year last year.

Now if you look at the magnitude and the ratios and the balance between all of those, if I had the ability to source license, I might be able to put that money in the programming where I think that money should go and I might be able to take some of the money that I'm paying for 4 million titles that I'm not using and buy different or better programming, or maybe expand my news department.

Senator **Leahy**. I might say your news department has very hard-working people. I don't always agree with them, but they are very, very hard-working people. They really are.

Mr. **Lombardo**. I appreciate that, Senator.

Senator **Leahy**. Thank you, Mr. Chairman.

Senator **De Concini**. The Senator from Alabama?

Senator **Heflin**. Let me ask you about the alternate licensing arrangement. There seems to be considerable disagreement, and of course you've had a court decision pertaining to that.

You say that these are just impossible, that you can't use them. It would be an impossible situation on these alternate sources that the court, in effect, found that you could have available to you.

Give me your arguments that say why you can't.

Mr. **Lombardo**. If I may, Senator—there have been some attempts to seek source licensing. The last hearing I believe has a very extensive record on the efforts by Storer Communications to do that.

It's interesting—Storer Communications, outside of the three major networks, is one of the larger broadcasting groups. If anyone would have a voice that could be heard, you would think that a group like that would have enough power, leverage to at least get a reasonable response. Their efforts were to no avail.

As you get into smaller and medium-sized television markets such as those that I operate in, I spoke with a gentleman by the name of Buddy Bostick who owns a television station in Waco, TX, which I consider a small- or medium-sized market. The paper trail on his attempts to get source licensing for one program, "Family Ties" from Paramount, extends over a year.

He, through persistence, finally got them, after an extended period of negotiation, to at least give them a price for source licensing on the program "Family Ties" for that one station. His license fee for the program was $115 per run. The studio quoted him $50 per run for the source licensing of the music. The music in "Family Ties" consists of basically theme and bridge music.

He felt that that was not a genuine attempt on the part of the studio to really bargain in good faith, and I tend to agree with him. If you're paying $115 and then you have to pay another $50 for theme music, that doesn't seem like good-faith bargaining.

Senator **Heflin**. You know, because primarily when Congress, the Federal Government gets involved into these matters, it's primarily because of the public's interest and the people's interest. How is the public's interest served by Congress' becoming involved in this?

Mr. **Lombardo**. If I had the ability to decide where my total programming dollar is to be spent and is going to be spent, my local public and every one of my communities is going to benefit from that. Right now there is a substantial portion of my total programming dollars that I have absolutely no control of.

Mr. **Cooney**. Hopefully this amendment would actually put more money into the composers' coffers and, consequently, more composers may reap this reward and would participate in providing music, and perhaps it could even be a better quality music.

Mr. **Arries**. On every local television station staff there are directors, writers, and obviously talent. Very few—very, very few—television stations have a composer on their staff. If this system were broken open so that there would be a free market, I believe that a number of television stations at the local level would hire composers for music for their newscasts, for their public affairs programs, for the opening of their movies. Now, because we're tied to a blanket license, we don't deal very often with local composers.

Composers in markets across America, those in that 85 percent that get nothing out of syndicated programs, would begin to come on local station staffs and see dollars that they won't ever see otherwise.

Senator **Heflin**. Well, is yours an analogy that legal services, house counsel, is better counsel than private law firms that you would employ? Is that your argument?

Mr. **Arries**. It certainly is, I can say, less expensive and more direct to have house counsel rather than go outside. The broadcasters of America can contrast that very quickly.

Senator **Heflin**. Now are there certain elements in regard to your industry that are suffering more than other elements? I gather you mention the independent stations. Are there categories of those you say suffer as a result of this system more than other segments of your industry?

Mr. **De Angelis**. Senator, let me respond to that question in this manner: there are a number of portions of the industry that suffer from the inequities of the current blanket licensing system. I think all stations suffer, but the independents are currently in a very fragile state and they suffer tremendously. But most small market stations suffer a tremendous harm from the current blanket licensing procedures.

It's widespread. It covers independents; it covers affiliates.

Senator **Heflin**. If some type of a compromise bill were worked out, and a rate structure system was still maintained in it, would you want to move the rate court from the Southern District of New York to some other location? Is it because of the backlog in that district as to litigation that you would be better served by a rate court in a different location?

STATEMENT OF BRUCE LEHMAN, COUNSEL, ALL-INDUSTRY TV MUSIC LICENSING COMMITTEE

Mr. **Lehman**. Senator, my name is Bruce Lehman, and I'm the counsel to the All-Industry TV Music Licensing Committee.

The problem with the rate court is not just its location in New York City. It is, in effect, a regulatory mechanism which is supposed to substitute for the normal marketplace, and in fact the reason that ASCAP is able to exist as a monopoly is because it is regulated by this court.

You've heard a lot about the Copyright Royalty Tribunal and other regulatory agencies in Washington that have been set up to deal with similar problems between owners of certain rights like Government copyrights and users. The Copyright Royalty Tribunal has frequently been criticized for being inefficient, and yet the Copyright Royalty Tribunal is probably a far more efficient mechanism than the rate court, because it is not encumbered with all of the limitations that are imposed by litigation under the Federal rules of civil procedure: discovery procedures, all the things that lawyers can do to make it tough for the other side.

Federal courts have not generally been set up to resolve these kinds of problems, and that is a problem with the rate court. There undoubtedly could be a more efficient regulatory mechanism other than the rate court to deal with this problem, but the bill that Senator Thurmond has introduced would require no regulatory mechanism at all. It would require, in effect, a—it would bring about a marketplace solution to the problem.

When the rate court procedure was set up in 1950 by the Justice Department's lawyers, they recognized that there were certain areas of copyright licensing which did not any longer have to be licensed by ASCAP, and the movies were one of them, movies shown in movie theaters. So they just simply took movie theaters out of the regulatory rate court system. That is all that Senator Thurmond's bill would do today for television.

Ironically, one of the reasons we have to come to Congress to do that is because of the very fact that ASCAP's monopoly has now been made legal and sanctified by the rate court procedure, which means that there is no other way to correct it other than congressional action to deal with the fundamental rights that are involved, and that's the copyright.

Senator HEFLIN. That's all that I have.

Senator DECONCINI. Thank you, Senator Heflin.

The Senator from Iowa.

Senator GRASSLEY. Mr. Chairman, I know that this is taking a long time. Therefore, I'm going to submit my questions for answers in writing, so that you can get on to the next panel.

Senator DECONCINI. Thank you, Senator Grassley. We'll have them.

I have other questions, too, gentlemen, that I'm not going to be able to ask you on the record here, but I am going to ask you to respond to them. They deal with some of the economics in the Phoenix market and the ratio of the costs that you pay for salaries and broadcast rights versus and rating services versus your cost that you pay to ASCAP and BMI. So I would appreciate it if you could answer some of those questions.

Thank you very much.

Mr. ARRIES. Mr. Chairman, might I just say that in Mr. David's written remarks he quotes me and it's out of context. He implies that I said something that was not the case.

Senator DECONCINI. Thank you. I'm glad to have that information.

[Responses of panel to questions by committee members, subsequently submitted for the record, follow:]

SWIDLER & BERLIN
CHARTERED
3000 K STREET, N.W.
SUITE 300
WASHINGTON, D.C. 20007-3841
(202) 944-4300

BRUCE A. LEHMAN
ATTORNEY-AT-LAW

DIRECT DIAL
(202) 944-4560
TELEX: 701131
TELECOPIER (202) 944-4296

December 22, 1987

Honorable Dennis DeConcini
Chairman, Subcommittee on Patents,
  Copyrights and Trademarks
Senate Judiciary Committee
SH-327 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are responses to questions of Messrs. Arries, Cooney, De Angelis, and Lombardo, accompanying your letters of November 24, 1987.

Please let us know if we can supply you or your staff with further information.

Sincerely yours,

Bruce Lehman

Bruce A. Lehman
Legislative Counsel
All-Industry TV Music
  License Committee

Enclosures

Response to Questions Submitted by Senator DeConcini

1. According to NAB statistics, Phoenix stations averaged $18,144,080 in total net revenues. The figures go on to show that these stations paid $264,306 in music license fees. If these figures are correct, and my first question would be if they are correct, then it would seem that these stations pay approximately 1.5% of their total net revenues for music. Are these figures correct for stations in these markets? How do these figures compare with your own experience in Phoenix? Do you think that it is unfair for a television station to pay 1.5% of their net revenues for music? For instance, these figures show that these stations pay 21.6% for salaries, 15.1% for broadcast rights, 1.1% for ratings services, and 1.1% for utilities. Is the cost of music out of line with the other costs of running a station?

Answer: First, we have no reason at this time for challenging the NAB figures cited. However, since they are estimated averages, some individual stations in the Phoenix market have considerably higher revenues, some less.

The most important fact to keep in mind about the NAB figures, however, is that they were published in 1986. In 1985 and 1986 local television stations were paying for ASCAP and BMI licenses in the basis of rates frozen in 1980 as a result of broadcaster litigation against ASCAP. Therefore, these figures are artificially low. In fact, broadcasters' 1987 rates are 50% higher, and all broadcasters have had to pay ASCAP retroactive increases since 1980. These retroactive increases are not reflected in the 1986 figures cited. In the absence of legislative reform, rates for the next five years will be established in the pending rate court proceeding. ASCAP is seeking a doubling of the current fees. This would very likely raise music licensing fees substantially above 2% of station revenues.

Furthermore, the music licensing fees paid to ASCAP (which exceed 2% of station revenue based on the 1987 revised payment structure) do not constitute the whole amount paid by local stations for music.

First, the ASCAP/BMI direct payments are in addition to the amounts paid directly by networks for the large portion of the local program day in which local stations air network programming. Stations as a practical matter pay for these fees through their network compensation structure. Second, stations also purchase music directly for their locally produced shows and commercials. Even where those stations utilize music in which performing rights are covered under the ASCAP/BMI licenses, they must obtain synchronization licenses directly from copyright owners. This adds considerable music costs to a station's budget. In sum, the 1.5% figure cited in the question is far lower than stations' actual music costs.

The best way to determine the fairness of music licensing costs is to compare them to the costs of syndicated programming. Even the figures presented in the question suggest a music cost equal to 10% of the cost of programming. In fact that cost is much higher. It is the view of many broadcasters that background and theme music, which is used over and over again in many episodes of a show, does not enjoy a value equal to the creative contributions, unique and fresh for every show, of such copyright contributors as screenwriters. In short, yes, music costs are out of line with other programming costs.

S.698 would not guarantee lower costs to broadcasters. It would, however, bring the discipline of the free marketplace to the music licensing process.

2. Is it true that one of your biggest objections to the

blanket license is the fact that you pay for the rights to music that you do not use?

Answer: Yes.

3. Isn't it more accurate to describe the present system as paying for the right to choose the music that you do want?

Answer: No. This question proceeds from an incorrect premise - the premise that S.698 is directed to our right to choose the music we want and to enable us to pay only for that music. In fact, broadcasters only make a choice of music in selecting the background and theme music for the programs they produce themselves -- the theme and background music in their own locally produced news, sports and public affairs programming. S.698 does not address the music used in this kind of programming. S.698 addresses the method of payment for music in syndicated television programs.

It is the Hollywood producer who chooses the music used in a syndicated program just as he or she chooses every other creative element appearing in the program.

What broadcasters choose is a program. When broadcasters license the performance copyrights to a program from Hollywood they want to get all the performance rights necessary to air that program, and there is no logical reason why they should not be able to do so except for an arbitrary process of historical evolution which has resulted in music being treated differently. S.698 would bring licensing of the music copyrights in a program into conformity with the licensing of all other creative elements in the program.

The desire on the part of broadcasters to be able to license all performance copyrights in one package is not arbitrary or unreasonable. In fact, it represents the most efficient way to license product and by far the most efficient mechanism for the operation of the music copyright system.

The inefficiencies of the existing system - which were tolerated historically only because they were necessary in an era of dance halls and vaudeville stages to carry out the Congressional grant of the performance right to music copyright owners -- are no longer necessary.

4. Why are you so sure that a source licensing system will result in less costs to the broadcasters? Is it because the syndication market is a buyers market?

Answer: Under S.698 local TV broadcasters will license all the performance copyrights in a program in a single package which will include music rights. This market today is certainly not a "buyers" market. In fact, the cost of syndicated programs has more than doubled in the last six years.

However, the syndication market (as opposed to the music licensing market) is a free market. Programs command a price the market will bear. If a broadcaster pays a high price for a program, he or she knows that a program likely to do well in the local market will be received in return. When syndicators price programming the free market requires that they have some basis for the price they ask. This unfortunately is not now the case when music rights are stripped out and sold separately through the legal monopolies, ASCAP and BMI.

By selling the music through ASCAP and BMI, separate from the programs incorporating the music, Hollywood studios can seek payment for something that has no real meaning in a television broadcast context: "publishing" rights. "Publishing" historically meant printing and distributing sheet music. Today, it usually means promoting music to the public by selling it to record companies and to movie and program producers themselves -- not broadcasters. There is no "publishing" activity inherent in the relationship between a program syndicator and a broadcaster. The free marketplace would never enable a syndicator to tack on an automatic music publishing fee to the price of a program.

To the extent that music contained in syndicated programs will cost less for broadcasters under "source" licensing this will be because syndicators will never be able to justify music publishing fees as part of the sale of a program.

5. If the composers and songwriters have chosen to pay part of their compensation to music publishers and performance rights societies why should Congress step in and overrule that decision?

Answer: Composers and songwriters of music in syndicated shows have not "chosen" to pay part of their compensation to music publishers and performance rights societies.

The fact is that the composers of 90 percent of all music in syndicated shows work "for hire" for the Hollywood producers. Thus, they do not possess the power to license anything to anybody. All rights belong to the studio itself which, is the copyright owner of the entire video package. The decision to split off music and assign it to ASCAP and BMI for separate licensing to stations is a decision made by the studios to enable them to take advantage of the monopoly leverage of ASCAP and BMI. This monopoly leverage produces revenue from stations for non existing publishing services.

Congress should intervene because it is the creator of all copyright powers. Where those powers are being used unfairly or in a manner which produces an inefficient marketplace Congress has the right, indeed the obligation to intervene.

6. If the amount that is now being paid to the music publishers and performance rights societies through the blanket license, were not paid directly to them, wouldn't the composers and songwriters have to pay it out of their compensation? Wouldn't this result in a sharp reduction in payment to composers and songwriters?

Answer: Songwriters and composers will never have to pay for "publishing" services which do not, in fact, exist. With regard to the 20 cents on every music dollar now taken by ASCAP and BMI for administration, one need look no further than the administrative expenses necessary to pay residuals to screenwriters, directors and actors to determine that composers would not be harmed financially. Residuals for screenwriters, directors and actors are distributed for a cost of less than 4 cents on each dollar distributed. To include composers in this same system would require nothing more than the addition of another line on the computer programs already in existence for distributing residuals to other creative talent. Under the residuals system the producer, not the creative talent, pays the administrative fee. There is no reason to believe that this efficient system would not work as well for composers as for others, with no loss in income to them whatsoever.

7. Can you come up with a formula that would result in payment of the same overall amount of money by the broadcasters, but more accurately reflect the actual use of music?

Answer: The best "formula" for paying for music in syndicated shows is the "free market". Such a free market would be achieved by S.698.

It is true that the $100 million currently being paid to ASCAP and BMI could be paid in a different manner which would be based on stations' actual use of music. However, the current $100 million figure does not reflect the operation of market forces and is unrealistic. It was achieved through the use of monopoly economic leverage over broadcasters, and it includes payments for non existent services to broadcasters such "publishing" services.

8. Isn't it true that broadcasters would have a difficult time negotiating a formula based on actual music use that paid the same amount of money because it would mean many broadcasters would actually pay more than they do now?

Answer: No.

Response to Questions Submitted by Senator Patrick Leahy

1. What impact would source licensing have on the cost of music?

Answer: The "cost" of music is the cost of creating musical compositions utilized in syndicated television programs. These costs are similar to other costs of talent incurred in producing programs, such as the costs of screenwriters, directors and actors who contribute to the end products of the Hollywood studios. There is nothing in S.698 which should change these costs. S.698 will, however, change the mechanism by which these costs are paid.

Under S.698 the producing studio will directly compensate the talent responsible for a program's music component just as the studio compensates the talents responsible for other elements in the program. The direct compensation paid by the studio will take the form not only of "up-front" payments at the time the music is composed as is currently the case for theatrical motion picture music, but will also include residual payments based on a show's continuing success.

These "residuals' are standard features of talent compensation in the syndicated TV business and are specifically mandated in S.698.

With passage of S.698 television stations will continue to constitute the ultimate source of revenue by which the "costs" of TV music are paid. However, television stations will supply that revenue in the form of a single payment or series of payments for the entire product, which includes the work of many creative talents, including music. The exact dollar amount of payments for particular shows, including music, will be determined by what the market will bear, as is now the case for programs sold without the music component.

The market place will provide a far more effective method, however, than presently exists for sorting out what the actual "costs" should be paid by television stations for what they receive. It is anticipated that the 60 cents on every dollar now paid through the non-market "blanket license" system which currently go to non-existent "publishing" services of the studio/producer and for ASCAP/BMI administrative expenses cannot be justified in the kind of market place setting which would result from enactment of S.698.

2. This legislation would entitle composers to an "interest" in the producer's compensation for licensing syndicated programming. What is meant by "an interest" in compensation? Would composers be compensated adequately?

Answer: The language of S.698 which entitles composers to an "interest" in producers compensation was carefully chosen by Senator Thurmond to protect the rights of composers. In seeking a tested and proven model that would work well, he looked to the Berne Convention for the Protection of Literary and Artistic works, considered by many to be the most comprehensive statement of copyright law in the world.

The Department of State and the Administration have announced their intention to seek United States Ratification of the Berne Convention as the primary treaty governing international copyright relations of the United States.

Article 14 ter of the Berne Convention establishes the "inalienable right" of an author to an "interest in any sale of the work subsequent to the first transfer by the author of the work." This principle, known as the droit de suite or "right in the work" in the laws of many nations, guarantees authors the right to receive compensation every time their works are resold. As applied in proposed section 201(f) of S.698, this would guarantee the right of composers and lyricists to receive a share of any continuing compensation received from licensing of audio-visual works in which their compositions are included, regardless of whether they had assigned all of their rights to the producer at the time of production.

In practical terms this section guarantees authors of music and lyrics used in syndicated television programs and commercials residual royalties similar to those now received by scriptwriters, actors and directors who contribute their creative talents to such programs.

For example, last year scriptwriters received $37 million in "residual" payments for continuing use of their work. The total composer share of royalties from ASCAP and BMI last year for all local television was approximately $24 million. This was actually less than other creative contributors to shows -- actors, writers and directors -- received in "residual" payments. Therefore, there is no reason to believe that composers would receive less than they do now -- or less than their fellow creators receive -- under the residuals system mandated in S.698.

Hollywood studios have always paid creative talent well for their important contributions to the end product -- a television show. Indeed, talent payments are a major element of production costs. There is no reason to believe this pattern will be altered in the case of composers.

The residuals system developed because it is a logical, efficient way to pay talent for continuing broadcast of syndicated shows. In contrast, the ASCAP/BMI system was developed in 1914 for an era of dancehalls and vaudeville stages -- long before television existed.

3. What would enable you to pay a fair market value and at the same time ensure an adequate payment to composers?

Answer: First, almost by definition payment of "fair market value" should ensure adequate payment for any goods or services offered to buyers in a commercial setting.

However, a brief examination of where money paid to

ASCAP and BMI now goes illustrates that the problem is not that broadcasters will pay too little to composers, but that they now pay too much to parties who have little to do with composing the music actually used in television programs. Sixty cents of every dollar now paid by broadcasters goes to someone other than the composer -- 40 cents of every dollar goes to the studios who produced the program for "publishing" fees. These fees are for a theoretical service that has nothing to do with the station's use of music and could never be justified in normal "free market" negotiations between buyers and sellers.

Similarly, ASCAP and BMI deduct nearly 20 cents of every music dollar paid by local TV stations for administrative expenses.

By contrast the administrative expenses for the free-market "residuals" system of compensation used by scriptwriters, actors and directors amount to only 4 cents on each dollar distributed in royalties. A free-market system for TV music payments would never result in such arbitrary and unreasonable payments being tacked on to composer's rightful compensation.

Response to Questions Submitted by
Senator Grassley

1. How do you respond to the contention that broadcasters have bargained successfully with ASCAP/BMI in the past, and that consequently there is no need for legislative response with a bill whose effect is to pressure only one side into negotiating?

Answer: Broadcasters have never believed that they have bargained successfully with ASCAP and BMI in the past. Broadcasters have reached industry-wide agreements with

ASCAP and BMI, but they have never considered them to be the result of the kind of free-market bargaining they are accustomed to in all their other business dealings.

The cornerstone of a successful bargaining process is the ability of the buyer to walk away from the table and seek the same product or service from someone else. This element is missing entirely in music copyright licensing today.

Even though there are many producers and suppliers of syndicated television programs, each of them assigns the copyrights necessary to broadcast the music on their programs to ASCAP and BMI. Most programs contain music assigned to both ASCAP and BMI. Therefore, while broadcasters have a choice of sellers in the programs they buy, they have no choice at all in the case of the music those same sellers dub into the program sound tracks. In short they must attempt to bargain with a monopoly: ASCAP and BMI.

ASCAP and BMI are legal monopolies, recognized as such in consent decrees both have signed with the Department of Justice.

Unfortunately, the limitations on ASCAP and BMI's monopoly powers provided in the consent decrees are largely meaningless to broadcasters and can be enforced, if at all, only through cumbersome litigation.

To the extent that "bargaining" has taken place in the past between broadcasters and ASCAP/BMI the only incentive for ASCAP and BMI to consider any alternative to their own unilateral demands has been the threat of litigation by broadcasters under the consent decrees or some other legal theory. This is hardly the kind of environment which most business people would consider "bargaining."

The total lack of a normal free market environment conducive to bargaining is illustrated clearly in the fact that not a single television station has ever been able to structure and deal with ASCAP or BMI on its own to meet its unique needs outside the context of the industry-wide efforts at dealing with ASCAP and BMI through threat of massive litigation.

This kind of cumbersome process does not serve the public interest in a free, competitive economy. Since it arises solely out of the exercise of congressionally granted and defined copyright powers Congress has the responsibility to correct it.

2. & 3. Can't the broadcasters go into Federal Court for the Southern District of New York and, under the antitrust consent decree that governs the broadcasters and ASCAP, request that the court (1) set the rates of the broadcast rights for the music contained in syndicated television programs, (2) rule on the validity of the blanket license, and (3) rule on the availability of broadcast licenses other than the blanket license (such as a program or direct license).

Hasn't a trial date for a final decision in the current rate case before the Southern District of New York, after many delays, been set for January, 1988?

Answer: Broadcasters can petition the Federal court to set the fees charged for use of music in syndicated programming. The court, however is not empowered to rule on the "validity of the blanket license" or the "availability" of broadcast licenses other than the blanket license.

At the present time litigation in the rate court is only thing that limits ASCAP's ability to demand any price from broadcasters. And, broadcasters are attempting to use this shield against ASCAP's arbitrary exercise of power. More than two and a half years ago, in April, 1985, just such a court case was initiated

The interim ruling, handed down in February, 1987, did nothing more than set the rates and conditions for ASCAP's TV licenses while the actual court trial takes place.

It took nearly two years for the Court to set rules to be applied during the trial. The trial itself is not now scheduled to begin until February 1988. That date may slip. With appeals the whole process of judicial ratemaking is expected to last well into the 1990's.

If S.698 were law, music in a program would be licensed at the time the program itself was licensed for broadcast. In most cases a fair price for the program package, including music, could be established in minutes at the bargaining table -- a far cry from 10 years in the U.S. District Court under an antitrust consent decree.

The ASCAP "rate court" is a far more cumbersome and intrusive form of intervention into the marketplace than other forms of government ratemaking which have long since been abolished or scaled back such as ICC, FAA and FERC ratemaking powers.

Only source licensing legislation can take TV music licensing out of the courts and into the marketplace where it belongs.

The Rate Court is an example of the problem, not a solution to the problem

4. How many people are employed, both directly and indirectly, by the local broadcast industry in Iowa?

Answer: There are 15 commercial television stations currently on the air in Iowa. Based on computer data available to the National Association of broadcasters, approximately 1200 people are employed directly by television broadcast stations in Iowa. When you consider the local suppliers of goods and services upon which these stations depend several thousand Iowans are economically dependent on broadcasting.

5. Will any local broadcaster be forced out of business if the Congress fails to enact source licensing legislation?

Answer: The Association of Independent Television Stations currently lists 23 stations (13% of its entire membership of 177) as being in some stage of bankruptcy.

Since individual stations are incapable of bargaining directly for music actually used by them and because they all must pay the same fixed, flat fee for music, traditionally a percentage of revenue up to 2%, the current music copyright system has an especially negative effect on their financial viability. Any business unable have any influence over nearly 2 percent of its costs and which must sell its product in a highly competitive marketplace, will have difficulty. The 2 percent of revenue currently going to music licensing can make the difference between survival or failure for some stations.

There are four stations in Iowa which have received construction permits from the FCC, but which have not yet gone on the air. Arbitrary music license fees could make the difference in whether these stations will make it or fall into bankruptcy like so many others.

6. What, if any affect will the Enactment of S.698 have upon the operation of any of the performing rights societies?

Answer: These societies will no longer license the music contained in syndicated television programs. However they will continue to license music used by radio stations, concert halls, nightclubs, restaurants, retail establishments and others. Composers, now paid through ASCAP and BMI, will receive payments through a residuals system instead.

Senator DECONCINI. We're going to go to the second panel. I want to say that these hearings are going to be closed at 1 o'clock whether we're finished or not. It may necessitate panel 3 to be heard at hearings later, because it's taking a great deal more time.

The next panel is Mr. Ed Cramer of BMI, Mr. Hal David of ASCAP, Ms. Alice Prager of SESAC, and Mr. Mike Post of Mike Post Productions.

Ladies and gentlemen, if you'd come up and put your statements in, we would appreciate it.

If you can summarize your remarks, ladies and gentlemen, your full statements will be in the record.

Senator LEAHY. Mr. Chairman.

Senator DECONCINI. Yes.

Senator LEAHY. Mr. Chairman, I am going to have to go to a matter on the floor in a few minutes. I would just ask permission to be able to submit further questions for the record to the last panel and some questions for the record for this panel.

Senator DECONCINI. Without objection, that will be proper. We will be leaving the record open.

Senator LEAHY. Thank you.

I note the one thing that concerned me was the discussion of the 20-percent overhead which, if that is accurate, I find pretty substantial, and a lot of my questions will be based, if it's not brought out in the hearings, on just how that comes about.

Thank you, Mr. Chairman.

Senator DECONCINI. Thank you.

Mr. Cramer, do you care to lead off?

Mr. CRAMER. I think we've agreed here that Mike Post would be the leadoff witness.

Senator DECONCINI. Mr. Post.

STATEMENT OF MIKE POST, MIKE POST PRODUCTIONS, BURBANK, CA

Mr. POST. Mr. Chairman, members of the committee, thank you for allowing me to speak to you today.

I think the reason that the performing rights societies have asked me to come here and represent composers is that I'm pretty typical of the people who write music for a living in the United States. I started as a musician playing in the clubs around Los Angeles. I started work when I was 15, writing songs and working in clubs, and moved on to play in the studios for records and television, and then moved on to becoming an arranger and a record producer, and, finally, landing in my current position or predicament, which is to supply the music for a number of television shows.

Currently, I have six shows on the air that I do all the music for every week: "Magnum P.I.," "Wise Guy," "Hooperman," "Hunter," "J.J. Starbuck," and "L.A. Law." In the past I have done all the music for all the segments of "Hill Street Blues" and, with my late partner, Pete Carpenter, we supplied all the music for "Rockford Files," "White Shadow," "A Team," "Rip Tide," "Hardcastle and McCormick," and "Baa Baa Blacksheep." In addition, we worked very hard on a number of unsuccessful pilots and short-lived series and movies of the week.

I think if you were to make a graph out of my career, it would show a line that starts at the street level and kind of makes a steady climb upward.

I'm really here today to concentrate on what the feelings are at the street level. I think that those feelings can be summed up in one or two words: "hope" and "dreams."

I can best give you an example of this by telling you of something that took place probably 15 years ago when my partner Pete and I had first started to write music for TV. We were doing the "Rockford Files," and Pete was 30 years my senior and experienced in television, having written for "I Spy" and "The Sheriff of Mayberry" and other shows.

We were sitting out in his music room on our 18th hour of our fourth 18-hour day working very hard, under a deadline. I believe our fee at the time from Universal, the producer of "Rockford Files," was $1,500 per segment. I turned and looked at him and I said, "Geez, we're out of ideas. We're out of time, out of energy. Is this a good business to be in? Are we doing anything right here? We're just getting beat up for nothing."

And he turned and looked at me and said, "You know, in 25 years when I'm dead and when you're older, this segment of 'Rockford Files' will play some place in the United States, and my heirs and you will receive a royalty for it."

Well, if S. 698 passes, all the bets are off and the things that Pete and I were dreaming of, and the things that we were hoping for, will be dead. I believe that the incentive for new writers will die with it.

I testified two times before. I've been in endless meetings about the source license. I've done some reading on it. It can appear to be a very intricate and very complex subject, but I think it can also be kind of simple. I think I understand the basics.

I don't think this is a matter of law. I think this is something that should be negotiated between two business entities.

As a composer, I have three performing rights societies to choose from. If I don't like the way one does business, I'm free to move to one of the others.

We have a system that works very well for us, the composers. It seems to me that the broadcasters have a number of ways to choose in how they pay for the music that they use. If they don't like how much they're paying, they have a mechanism of the Federal Government to go to to get relief from that.

No matter what is said here and no matter what I've read, I still believe that what the broadcasters want is to use the music that we write and not pay for it. After 25 years in this business, I believe that if this bill passes, it will be the beginning of the end for ASCAP, SESAC, and BMI. I believe the quality of music will plummet. I believe the public interest will not be served. I believe that people will have to write music as a hobby and the dream of making a living from writing music will die.

I truly believe this bill is wrong. Please don't let the creative community or the public down by passing this bill or any other source licensing bill.

Thank you.

[The prepared statement of Mr. Post follows:]

TESTIMONY

by

Mike Post

Mr. Chairman, my name is Mike Post. I am deeply honored to have become the spokesperson for my fellow composers against the source licensing legislation. Since I testified against this legislation last year, many composers have made a point of commending my stand -- and not one has expressed disagreement. Today, I would like to tell you why composers are against this bill, and why it is against the public interest.

The reason I have been chosen to speak to you on behalf of composers against this legislation is because I am typical of the people who make a living writing music. I started as a musician playing in the clubs around Los Angeles, and progressed to working as a studio musician and then to becoming an arranger and record producer, all the while writing songs and trying to get them heard or recorded or published. Eventually this path led to my current work as a television composer.

If you charted my career, it would be a steady, uphill climb from the street level. Today, I am responsible for five and one-half hours of prime time television each week, including "L.A. Law," Magnum, P.I.," "Hunter," "Hooperman," "Wiseguy," and "J.J. Starbuck." In the past, my late partner, Pete Carpenter, and I did all of the music for "Rockford Files," "White Shadow," "Hill Street Blues," and several other short-lived series as well as many unsuccessful pilots.

I would like to repeat a story about Pete Carpenter and me that I told when I testified last year, because the story really makes the point as to why composers are against the source licensing legislation. The story is all the more relevant because Pete passed away in October. He was thirty years my senior and wrote music for television shows aired many years ago, including "Mission Impossible", "I Spy" and "The Andy Griffith Show."

One night, Pete and I were working out in back of his house, and we were on our fourth day of eighteen-hour days. We were out of time, out of ideas, and out of patience. I turned to him and said, "Is this really worth it? I mean, we are killing ourselves here. Is this really worth it?" And he turned to me and said:

> "Let me tell you something, kid. Many years from now when I am dust and you are old, this segment of "Rockford Files" will play some place in the United States, and my heirs and you will receive a payment."

If Congress passed this source licensing legislation, all bets are off!

Senators seem to recognize that it is composers who will lose if the source licensing bill becomes law, because that is the matter I was asked about repeatedly last year. The broadcasters are supporting this legislation specifically because they believe that they will pay less for the music they use. If that is correct, then because S. 698 would require composers to be paid at the source by program producers, the only way composers are not going to lose money is if the producers pay more upfront.

I am making a successful living composing music for television. But because I came up from the street in my business, I can also speak for the newcomers to it. With my success, I would give the producers a battle over compensation, but I would not stand a chance -- they would run me through a wringer and hang me out to dry. And if they can do that to me, the newcomers will really be hit.

The reason I would lose, and newcomers would really lose, is simple economics. Television shows are produced and initially sold at a loss, in the hope of profits from repeated broadcasts. There is no way producers are going to pay me, let alone newcomers, the same amount upfront we can get from repeated broadcasts -- because the producers don't know upfront if they are going to make any profit from repeated broadcasts, and they are certainly not going to want to incur more upfront debt.

It appears that the supporters of S. 698 have come to agree with me on this matter, because I understand that they are now talking about some sort of per-performance payment for music aired on television. To me, however, that would be like re-inventing a wheel that already rolls.

Under the licensing system which has been in place for more than forty years, copyright holders are paid when their music is aired on television. Because there are millions of performances of music on television each year, no single composer or music publisher could afford to monitor all broadcasts to detect performances and due compensation of their music. To provide this accounting, and to negotiate with the broadcasters the form of license and the amount of compensation for music performances, composers and publishers generally license their music through central clearinghouses, like BMI, ASCAP and SESAC. By the same token, it seems to me that it is much easier for a broadcaster to have a single license for the music it airs than to have to hunt down the copyright owner of each piece of music the broadcaster wishes to play.

This licensing system has worked well over the years, but, for their own reasons, the broadcasters want to abolish it. Whenever a paymaster suggests such a major change in a payment system, its payees are naturally suspicious, and the paymaster must bear the burden of convincing the payees that its change is in the payees' best interests. The broadcasters have failed to meet this burden because not one credible composer has ever expressed support for their legislation!

Composers are the ones who will lose if S. 698 becomes the law. When we lose, the public will also lose, because the real question raised by S. 698 is whether people can make a living composing music. If you could not make a living even doing something you really love to do, you would have to do something else to support yourself and your family, and that is the threat S. 698 poses to me and my fellow composers. How good will music be when its creation is a hobby, rather than a professional art? The answer, Mr. Chairman, is that the quality of music will plummet if S. 698 becomes the law.

There have been statements that the present licensing system is bad for the public because it discriminates against new music composers and thus subsidizes the "production of mediocre music." Those statements are not only insulting to the public's intelligence but also absolutely untrue.

My entire career is a demonstration of how newcomers can be successful in composing music for television shows. Some ten years ago, I was a newcomer. Before me, Henry Mancini and Hal David were newcomers. Today, much of the music on television shows is written by composers who were not in this field a short time ago.

In that regard, it amused me when a rumor was circulating that Mike Post is actually a bunch of ghostwriters. The truth is that I find it impossible to write every piece of music for every show, and I have a staff of newcomers to fill in some of the blanks. Before

Pete Carpenter and me, composers that filled in blanks were called ghosts because they were invisible. That is no longer so. Our staff is named and shares specifically in our royalties and other payments. In addition, producers are made very well aware of who writes what, when and how. I am proud of that. It is something I have been able to do for my profession, starting as a newcomer myself.

As I see things, this legislation is really a simple matter. The broadcasters want to change the system that has served the public and music creativity well. No matter what arguments the broadcasters make, their motive is money. Ralph Oman, the Registrar of Copyrights, put it best last year, when he used a quotation to capsulize the broadcasters' position: "When someone tells you it's the principle, and not the money ... it's the money." Their legislation is not in the public interest, and I know you will reject it.

Senator DECONCINI. Mr. David, would you like to go next?

STATEMENT OF HAL DAVID, ASCAP

Mr. DAVID. Thank you.

I would like to thank the committee for giving me the opportunity to appear on behalf of the Nation's composers and lyricists on this matter of great importance to our well-being.

The source licensing bill, S. 698, may have a new number this year, but it's really the same old bill that died in committee in both Houses after three lengthy hearings last year.

The basic rights involve remain unchanged; namely, the separation of the synchronization and performing rights. Of the two, the performing right is by far the more important. Its heart and soul is the continuing payment for the continuing use of music by the music user.

What it comes down to is this: a songwriter puts pen to paper; a TV producer records that song for his show and pays a modest synchronization fee for that right; a local TV station broadcasts the show with that music and pays a fee for that performance right. The difference is clear. It's like the difference between the right to record a song and the right to broadcast the recording. In other words, it affirms the principle that the user pays for the use of the music.

The TV station, if it so wishes, can obtain from ASCAP a blanket license to use any and all ASCAP music. If it feels it does not use enough music to justify a blanket license, it can get a per-program license or a source license through the syndicator or a direct license from the composer. That's the present system. It works. It has worked well for nearly 40 years.

The broadcasters' arguments haven't changed. They are back once again alleging that ASCAP refuses to permit any license other than a blanket license and will not agree to any reasonable fee for a per-program license. That's all nonsense.

The broadcasters want you to ignore that the law does not allow such refusals. The broadcasters want you to ignore that the law puts the burden of proof as to what is reasonable on our shoulders. They would have you ignore the words of the president of the NAB, Mr. Ed Fritts, who said of the blanket license in the fall of 1985, and I quote:

> This process affords two large entities with knowledge and experience in the field to negotiate a price that correctly reflects the value of the works in the marketplace. There is no disproportionate size or wealth advantage that one side possesses over the other. Quite to the contrary, there's equality of bargaining positions.

That's what Mr. Fritts has said.

The broadcasters' real objective in pushing this bill has not changed. They still want to pay little or nothing for our music. They would have songwriters sell their performing rights before anyone knows whether the show or the song will succeed. Under this bill, composers would lose what they get today; namely, continuing royalties for the continuing performances of their work.

There are, however, four new developments since last year's hearings, and all four confirm Congress' wisdom in staying out of the bargaining process between the broadcasters and the performing rights organizations.

First, despite their assertion that last year's bill would be good for songwriters, the backers of this bill recognized that there was a serious flaw in their proposal, so they cosmetically amended it this year to insert a provision that songwriters would retain some unspecified "interest in any compensation paid to the owner" of a TV show purchased by a broadcaster. But it would be absurd for any songwriter to rely on a provision that fails to define what that interest is, imposes no enforceable obligation, and guarantees no minimum period of percentage. We would have to take leave of our senses to accept such a provision offered by our adversaries as our guarantee of income.

Second, this year's House version of the bill includes an equally cosmetic provision giving certain composers deemed "made-for-hire" employees the right to join a union and bargain collectively. This amendment, which was withdrawn by the bill's Senate sponsor, would not apply to composers of preexisting music or to families of deceased composers and lyricists, nor do we know how it might affect music creators who practice their profession in right-to-work States.

Many songwriters, myself included, belong to unions, but we have freely chosen to belong to our present organizations: ASCAP, BMI, and SESAC. We do not believe that our organizations should be mutilated or that we should be forced to join one not of our own choosing. In short, neither of these amendments works.

Third, on February 17, 1987, the Federal court in New York handed down an interim fee decision that was hailed by Mr. Les Arries as, and I quote, "a landmark decision for our industry." That's his actual statement, and I'll send a copy to Mr. Arries to remind him and also give a copy to this panel.

A trial now set for January 19, 1988, will weigh all the facts and arguments and decide what fees are reasonable.

Fourth, at ASCAP's prodding, serious negotiations between the broadcasters and ASCAP finally began in September of 1986. After a number of meetings, the broadcasters walked out of the negotiations and asked Congress once again to intervene.

Let me note that substantial progress was being made in those negotiations. If Congress is no more willing this year than it was last year to intervene, the broadcasters may well return to the negotiating table. We will keep our door open to them.

If they prefer to await the court's determination after a trial in January, this coming January, as to what license fees are reasonable, we are also content to live by that process.

Our preference is to negotiate an agreement as we have with all other industry committees for nearly 40 years, and as we did only last year with the All-Industry Radio Committee.

Our composers and publishers have always decided among themselves how to divide the royalties their music earned. After operating expenses, last year's payments to ASCAP members totaled 82 percent of our gross.

As a nation we are deeply concerned with improving our trade balance, and our music is a decidedly positive force in an otherwise negative trade situation.

Finally, I would like to say the present system works. Composers are motivated. Broadcasters are profitable. The American public enjoys more American music, and our music is hailed and purchased all over the world. For the sake of all music creators, I urge you to stop source licensing at the source.

Thank you.

[The prepared statement of Mr. David follows:]

STATEMENT OF HAL DAVID IN BEHALF OF ASCAP

Subcommittee on Patents, Copyrights and Trademarks

I want to thank the committee for giving us the opportunity to appear in behalf of the nation's composers and lyricists on this matter of continuing importance to their well-being, and to the well-being of American music.

S. 698 has not changed in substance since this proposal died in committee in both Houses after three lengthy hearings last year. It still represents a mortal threat to the creation of American music.

Neither have the basic rights involved changed. Those rights are the separate synchronization and performing rights. They are in the copyright law because people dedicated to fostering creativity struggled for decades to successfully convince Congress that they belong there. Of the two, the performing right is by far the more important economically. Its heart and soul is the continuing payment for the continuing use of music by the user.

What it comes down to is this: A composer or lyricist puts pen to paper. A TV producer records that song for his syndicated show and pays a modest synchronization fee for that right. A local TV station broadcasts the show with that song and pays a performance fee for that right.

The difference is clear. It is like the difference between the right to record a song and the right to broadcast the recording. It is a constant and consistent affirmation of the principle that the user pays for the use of the music. It is the driving force behind music creativity in the U.S.

There are tens of thousands of local entities that make commercial use of copyrighted music. ASCAP was formed by the copyright owners, the composers and publishers of America, to locate and license and monitor all these users, to collect royalties, to represent the copyright owners in court and in

Congress, in state legislatures, and to negotiate with and if necessary to sue infringers.

The TV station, if it so wishes, can obtain from ASCAP a blanket license to use any and all ASCAP music without fear of infringement. If it feels it does not use enough copyrighted music to need a blanket license, it can get a per program license from ASCAP, or a source license through the TV syndicator, or a direct license from the composer. That is the present system. It works. It has worked well for nearly 40 years. The only thing which has changed since last year's hearings is that the rate court has handed down an interim decision in February of this year, which was hailed by Mr. Les Arries as one which "...will prove to be a landmark decision for our industry" and one which once again reaffirmed the validity of blanket and per program licenses.

The broadcasters' arguments haven't changed either. They are back once again alleging that ASCAP is refusing to permit any license other than a blanket license, and refusing to agree to any reasonable fee for a per program license. That's all nonsense; the law does not allow such refusals. The courts have consistently ruled that these allegations are not supported by the facts. The broadcasters want you to ignore that the law puts the burden of proof as to reasonableness on our shoulders. They want you to ignore the fact that they have twice broken off negotiations with us. They want you to ignore their violation of their signed confidentiality agreement. They want you to ignore the words of the President of the NAB, Mr. Ed Fritts, who said of the blanket license in the fall of 1985, "This process affords two large entities, with knowledge and experience in the field to negotiate a price that correctly reflects the value of works in the market place. There is no disproportionate size or wealth advantage that one side possesses over the other; quite to the contrary, there is equality of bargaining positions."

The broadcasters' real objectives in pushing this bill haven't changed since last year either. They still want to pay little or nothing for copyrighted music. If they convince Congress to replace the current system of choice by one requiring songwriters to sell the performing rights to our music on a syndicated TV show before anyone knows whether the show or song will succeed -- we will be forced to bargain when our bargaining power is at its lowest. Some of us may be able to take care of ourselves; but new songwriters under this bill would not get what they get today, namely, continuing royalties for continuing performances of their work. In other words, writers receive higher royalties for more frequent performances of their work, and lower royalties for less frequent performances of their work.

There have been, to be sure, four new developments in this area since last year's hearings; but all four confirm the wisdom of Congress's staying out of the bargaining between the local TV broadcasters and the performing right societies.

First, despite their assertions that last year's bill would have been good for songwriters, the backers of this bill recognized that they could not get away with destroying the performing right. So they cosmetically amended it this year to insert a provision that songwriters would retain some unspecified "interest in any compensation paid to the owner" of a TV show purchased by a broadcaster. But it would be absurd for any songwriter to rely on an illusory provision that fails to define what that interest is, imposes no enforceable obligation, guarantees no minimum period or percentage, and contains no relief from the bill's fundamentally unfair requirement that the songwriter's compensation be settled before the value of his work is known.

Songwriters are now guaranteed payment for use of their music whenever and wherever it is played. We would have to take leave of our senses to accept such a provision, offered by our adversaries, as our guarantee of income.

Second, in addition to this provision, this year's House version of source licensing legislation includes an equally cosmetic provision giving certain composers -- those who are deemed "made-for-hire" employees -- the right to join a union and bargain collectively. This amendment, which was withdrawn by the bill's Senate sponsor, would not apply to composers of music already written or produced, or to families of deceased composers and lyricists. Nor do we know how it might affect those music creators who practice their profession in right-to-work states.

Many songwriters, myself included, belong to unions. We respect them. But we who write songs have freely chosen to belong to our present organizations. These organizations -- ASCAP, BMI, and SESAC -- trace their origins to the voluntary decision of American songwriters and composers some 75 years ago to associate for their own protection and well being. Their decision was well-founded and has worked for the benefit of all of us and for American music which is now pre-eminent throughout the world.

We do not believe that our organizations should be mutilated or that we should be forced to join an organization not of our own choosing. Those who clearly do not have our interests at heart have concocted this scheme as a cover for avoiding their responsibility to pay for our product, the music we write and they use. In short, both of these amendments are fluff. The legislation is basically unchanged from last year, and its objective is clearly the same.

Third, as I mentioned earlier, on February 17, 1987, the Federal court in New York handed down an interim fee decision that unequivocally rejected the same broadcaster arguments repeated here by reaffirming the validity of the existing blanket and per program license system. A trial, now set for January 19, 1988, will weigh all of these facts and arguments and decide what fees are reasonable.

Fourth, at ASCAP's prodding, serious negotiations between the broadcasters and ASCAP to resolve the license fee question without a Congressional or court ruling finally commenced in September of 1986. Unfortunately, the broadcasters walked out of the negotiations and asked Congress once again to intervene.

Under the Federal rules of evidence regarding the non-disclosure of settlement negotiations on pending matters, as well as our confidentiality agreement with the broadcasters' All-Industry Committee, I will simply note that substantial progress was being made in these negotiations. If Congress is no more willing this year than last to intervene, they may well return to the negotiating table. We will keep the door open for them.

But, if they prefer to await the court's determination after trial in January as to what license fee arrangements are reasonable, we are also content to live by that process. Our preference is to negotiate an agreement, as we have with other all-industry committees for nearly 40 years; and as we did only last year for the Radio All-Industry Committee.

Mr. Chairman, for nearly 40 years the existing free market system offering blanket, per program, direct, and source licensing has assured the American television public of quality music and has assured the American songwriter of an adequate economic incentive. There are and always have been these four options for licensing music. What the broadcasters want to do, through this bill, is force one method of doing business upon us -- the method that benefits only them.

For nearly 40 years the broadcasters and the creators of American music have negotiated reasonable license fees and structures under the watchful eye of the Federal court in New York, providing steadily lower rates for the broadcasters to pay even as their profits have steadily increased.

For nearly 40 years the composers and publishers who are responsible for the creation of American TV music have decided among themselves how to divide the royalties their music earned, after payment of operating expenses, including payments to those publishers owned by broadcasters as well as those owned by TV production studios and independents. Last year these payments /to ASCAP members totaled 82 percent of our gross. It is difficult to find any business which can boast of such distribution to its stockholders or owners.

As a nation, we are deeply concerned with improving our trade balance and also with safeguarding our intellectual property abroad. Our music is a decidedly positive force in an otherwise negative trade situation. And we must operate in a way that places this country squarely on the side of protecting the creators and preventing any kind of foreign retaliation. Rest assured that if we discriminate against foreign writers by reducing their revenues, they will respond in kind.

Today, the present system works well -- composers are motivated, broadcasters are profitable, the American public gets more American music, and American music is hailed and purchased all over the world. For Congress now to destroy that system -- and thereby to destroy an aspiring songwriter's incentive -- would be an unthinkable tragedy.

For the sake of all music creators, I urge you to stop source licensing legislation at the source.

Senator DECONCINI. Thank you, Mr. David.
Mr. Cramer.

STATEMENT OF EDWARD M. CRAMER, CONSULTANT, BROADCAST MUSIC, INC., NY

Mr. CRAMER. Mr. Chairman, I want to make sure that my colleague, Mrs. Prager of SESAC, will have time to follow me. I have a brief statement.

Mr. DAVID. Forgive me, Ed. We have a distinguished colleague here and I would like, with your permission, to introduce him: Mr. Henry Mancini.

Senator DECONCINI. Sure. The record will show Mr. Mancini is here.

Mr. Cramer.

Mr. CRAMER. Mr. Chairman, Mrs. Preston, who is sitting right there, the president of BMI, requested me to testify because as her predecessor for nearly 20 years I negotiated every contract with the broadcasting industry during that period and I have personal knowledge of all the facts and circumstances during this time.

Before coming to BMI, I was an attorney in private practice in New York for 18 years specializing in copyright law. BMI was one of my clients. I have a master's degree in copyright and trade regulations. Thirty-five years ago I was a founding member of the Copyright Society, and at the present time I am one of six members of the advisory panel of the Practicing Law Institute on Communications and Copyright Law.

The purpose of this brief summary of my background I hope qualifies me as an expert on the subject of supermarket shopping. If you go into a supermarket, you can buy eggs. You usually buy them by the dozen or half dozen, but I suppose you could buy them by the pound. Should Congress legislate how you should buy eggs in your supermarket?

When I grew up as a boy I lived in an area where we had lots of apple orchards, and those of us that bought or sold apples did it by the bushel. If you go into a supermarket today, you buy apples by the pound, but right next to the apple section is the orange section, and you buy oranges by the piece, six for a dollar or whatever the price is. Why are apples sold by the pound and oranges by the piece? I suppose the easy answer is that one is apples and one is oranges. But is that a subject that Congress should legislate—how we should sell eggs, apples, oranges? No, I don't think anyone would say that. That's a market factor, and I suggest to you that that is the issue here. It is a market consideration.

As long as there are alternatives, and that question of whether there were alternatives was addressed in the *Buffalo* case and also in the *CBS* case, and both courts decided, yes, there were alternatives.

Now, to conclude, because there's a lot of information—misinformation—that was presented to this committee this morning, and BMI would welcome the opportunity to submit the answers for the record.

I just have one last comment, Senator. You asked, and Senator Leahy asked, about this carve-out or—I forget what other term was used—credit; thank you. The fact is, and this appears in the *Buffalo* case:

> The station showed no interest in source licensing even during the period from 1950 to 1972 when the carve-out provision of blanket license issued by BMI permitted this carve-out or deduction. The stations insisted that it come out of the contract.

I personally can attest to that because I was on the negotiating team, and I headed that negotiating team. Why did they want it out? Because they said:

> We just concluded a contract with ASCAP. We think that contract is so good that we want the exact same contract with BMI that we negotiated with ASCAP, and it does not have the carve-out provision and we want it out.
>
> You want it out? It's out.

At the conclusion of the *Buffalo* case the last questions asked at the trial—and these people (pointing to Mr. Arries and Mr. Rich) were sitting there—were asked of me by counsel for BMI after going into this. He said, "Mr. Cramer, you had to carve out—would you be willing, if asked, to give it back to the broadcasters?"

And I said to them in 1981 or 1982 on the stand under oath, "I would be willing to negotiate to give that back to them."

And, Senator, from the time I got off that witness stand until the time I left BMI—this is a fact—not one broadcaster ever asked me for the carve-out provision.

Thank you for the time. I'll answer the rest for the record.

[The prepared statement of Mr. Cramer follows:]

TESTIMONY

by

Edward M. Cramer
Consultant
Broadcast Music, Inc.

My name is Edward M. Cramer. I am an Attorney in private practice and a consultant to Broadcast Music, Inc. (BMI), where, until about a year ago, I was President and Chief Executive Officer. BMI is a performing rights organization that currently represents the interests of more than 80,000 writers and publishers. I submit this statement on their behalf in opposition to S. 698.

My tenure with BMI as its President encompassed nearly two decades and, for a number of years previous, I was directly involved in various legal aspects of the entertainment business having to do specifically with copyright law. (That involvement resumed again after I retired, last year, as President of BMI.) I have represented leading writers and publishers (both music and literary); recording companies, motion picture and theatrical interests, advertising agencies, etc. I am a founder of the Copyright Society of the U.S.A., and have remained active in that organization for more than 35 years.

I appeared before this same Senate Subcommittee in April of 1986 to express opposition to S. 1980, the 99th Congress precursor to S. 698. As my statement of that time indicated, S. 1980 was a flawed and unnecessary piece of special interest legislation.

S. 698 is a modified version of S. 1980 and the very fact that it has been changed implies that the sponsors, too, felt that the earlier version was flawed. Unfortunately, the modification, and there is only one, is merely cosmetic. It has no practical effect and our opposition, therefore, is every bit as strong as it was previously and much of what I said before now bears repeating.

As experienced legislators, I am sure you will agree that the following are among the most significant factors that need to be evaluated before a law is changed:

I. What is the real purpose of the law which S. 698 seeks to change?

II. Does the present system injure anyone?

III. Whom does the law presently benefit?

IV. What arguments have been made in favor of change?

I. THE PURPOSE OF THE PRESENT LAW

The proposal before you, today, is not intended to create a new law. What you are considering instead is whether or not to revise the current copyright law which became effective less than 10 years ago and was, in itself, a revision of the then existing 1909 copyright law. It is significant that the 1978 revision took place only after some 20 years of research and debate. It is significant, too, that nowhere in the thousands of pages of studies and hearing transcripts associated with the 1978 copyright law revision is there any discussion of the substance which S. 698 attempts to address. No television broadcaster ever considered the matter which is in front of you, today, sufficiently important to bring it before Congress during the discussions which produced the present law.

For the background of the law, one need go no further than the Constitution of the United States. Article I, Section 8 specifically authorizes Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries."

Consider that for a moment. Congress is authorized "to promote the Progress of Science and useful Arts...", but for whom? The answer is fairly obvious....for the general public!

I am certain that you, too, must share these views held by our forefathers. Clearly, all of us benefit from new inventions, new writings, new pieces of music and new works of art. But, just as we all benefit, so, too, must the creators of these things. Like you and me, they, too, need money for food, shelter and clothing. Like us, their homes and belongings sometimes need repair and they, too, want education for their children.

To put it very simply, these creators do not -- and cannot -- live in an economic vacuum. They need assurance that they can earn a living from their creativity.

It may seem materialistic, but there is little doubt that without the Copyright Law to assure a reasonable return on one's creativity, we would have far fewer libraries because fewer books would have been written. There would be few, if any, contemporary art galleries because there would no pictures to line their walls. Fewer actors would trod the boards because new plays would not be written and, I hasten to add, there would be far fewer broadcast stations because there would no longer be an almost unlimited supply of program product. Without the Copyright Law we would find ourselves in the midst of a cold, bleak, cultural winter. Indeed, even the staunchest proponents of S. 698 -- the television broadcasters themselves -- have repeatedly come before various tribunals to ensure their own, continued protection under the present Copyright Act.

Please understand that these views are not original with me. They have been recited by the Supreme Court in almost every decision involving copyright:

> "...Article I, Sec. 8 of the Constitution provides that: 'The Congress shall have the power...to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.'
>
> The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired. (Underscoring added.)
>
> The copyright law, like the patent statute, makes reward to the owner a secondary consideration." *Sony Corporation of America et al. v. Universal City Studios, Inc. et al.*, 464 U.S. 417 (1984).

Chief Justice Hughes spoke similarly in another opinion:

> "The sole interest of the United States and primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors. It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius." *United States v. Paramount Pictures*, 334 U.S. 131, 158, 77 USPQ 234, 253 (Underscoring added).

Clearly, the Copyright Law revision proposed by S. 698 will not -- and *cannot* -- stimulate creativity. Whether or not it will actually reduce the amount broadcasters pay for their program material is uncertain. Music, of course, represents only a miniscule part of that cost...only about 1% of the broadcasters' gross revenue.

One thing is certain, however. *If* the broadcasters do save any money, then it will ultimately come from the pockets of those whose toil created the music used by those same broadcasters. And, any reduction of income to the creator will also result in a reduced incentive to create. In my view, this is neither in the public interest nor in keeping with the fundamental principles of the Constitution.

II. DOES THE PRESENT SYSTEM INJURE ANYONE?

Since S. 698 is, in effect, "remedial" legislation, there is, in my view, a basic, threshold question that must be addressed. Just whom has the present system injured?

In my view, that question can be answered in two short words....no one!! Absolutely no one has been injured and that includes the system's most vocal group of detractors -- the television broadcasters, themselves.

I won't deny, of course, that television broadcasters are "claiming" injury, but what evidence exists? Can any one TV broadcaster even claim that the tiny percentage of gross revenues he is paying in music license fees has placed him in financial difficulty? I must also point out, by the way, that these station revenues are derived entirely from the sale of program product...programs whose commercial success has been immeasurably contributed to by the creative genius of those we represent.

Insofar as financial difficulties are concerned, however, that same question can be asked of the 160 or so corporations who own the lion's share of the approximately 1,000 commercial television stations in the United States, today. Considering that they have just successfully obtained government permission to increase their holdings from six to 12 television stations, I think the answer is obvious.

And on the broadest of all levels, is the industry itself in trouble? As The New York Times commented, "Well run independent stations can post profit margins of as high as 40%." That comment appeared in the body of a news story about the sale of New York's WOR-TV for an amount approximately 20 times its cash flow. And just this past month, Avenue magazine wrote, in a special section titled "BROADCASTING: The Big New Money Game", "The idea is to support a TV station for a couple of years and then to sell it for an absurdly high price."

By the way, consider for a moment just what it is that these stations are selling at an almost obscene profit. Is it something that they actually own....real estate or, perhaps, some electronic hardware? According to The Wall Street Journal, it is not! The Journal, in a commentary, noted that "In the past year, private investors have made close to $10 billion selling broadcasting rights owned by the U.S. Government. The Treasury received nothing."

I should point out, however, that your colleagues in the Senate Commerce Committee have recently taken active note of the situation. As part of a package to help reduce the federal deficit, they approved the following:

> A 4% fee on the sale of any broadcast license held for less than three years and a 2% fee on the sale of any broadcast license.
>
> An additional 1% fee to be paid by any license seller who has been found to have "willfully violated" the fairness doctrine.

Revenues from these fees are estimated to be some $340 million dollars annually and are intended to go toward the fiscal '88 and '89 federal deficit reduction. Certainly, before recommending this new fee, your colleagues must have given considerable thought to the economic health of the broadcast industry.

Incidentally, as reported in the Congressional Quarterly, the National Association of Broadcasters has said that they will "fight...(these fees)...every step of the way."

III. WHOM DOES THE PRESENT LAW BENEFIT?

Here, too, the answer is short....everyone!! In the long run, it is all of us....the general public....who really benefit. But, since my primary focus, today, is on one specific group, let us look more carefully at it.

The writers and composers whose music is used for television fall generally into two large groups. The first consists of those who write music intended to be a primary focus of attention. We call this feature music, and the bulk of it is not written with a particular program in mind. The country hits you hear on Hee Haw, the current hits on American Bandstand or Solid Gold and even some of the hard-driving sounds on Miami Vice are all representative of feature music.

The second category is far more difficult to appreciate. These are the television theme and background music composers. The contribution they make is generally designed to be subtle....to unobtrusively create an illusion, carry a scene or set a mood. By and large, background music is designed to be almost subliminal and one is more likely to be aware of its absence rather than its presence.

By necessity, the composers in this group are especially skillful. True, they are often not nearly as well known to the public as are their feature music counterparts, but, virtually without exception, they are extraordinarily well-schooled and versatile. One of these is composer Mike Post who will be speaking to you directly on behalf of himself and the many others like him.

The evident question, of course, is just how do these people benefit under the present payment system?

The current practice in the industry is one that has evolved over a great many years. It does away with the conventional employer/employee relationship insofar as the composer and program producer are concerned.

The common practice, today, is for composers to be paid virtually nothing, up front, for their composition efforts. The relatively small amount of money they do receive is primarily for their arranging and conducting their music. The compensating balance, however, is the fact that the composers retain all of their performing rights and, if the program is successful, will receive ongoing royalty payments.

There are several great advantages to this system. First and foremost, the musical creator is assured of a continuing income source _if_ the program is successful. The more a program is used, the more the composer earns. True, far more programs fail than are ever successful, but background music writers -- like most of us -- tend toward eternal optimism.

Secondly, both the composer and the producer are spared the impossible task of determining the worth of a product -- and negotiating for it -- well before that product has even been marketed. I strongly doubt that anyone, for example, could have predicted the continuing popularity enjoyed by _Star Trek_ before the initial pilot program had even been viewed.

Finally, there is at least one fringe benefit. Since there is no need to pay a great deal of money out up front, small, low-budget producers can afford the same, high musical quality of big-budget programs. The ultimate beneficiary of this is, of course, the general viewing public.

IV. WHAT ARGUMENTS HAVE BEEN MADE IN FAVOR OF CHANGE?

One of the most pervasive arguments is also the most misleading. Proponents of the bill have repeatedly claimed that there is something unjust about the present law. They argue that since motion picture theaters are not required to have separate performing rights licenses for the music in films, why, then, should television be treated differently?

The argument is a very slick one. It is also a very superficial one!

As a matter of law, theaters are not exempted from any requirement to obtain a performing rights license. In practice, however, they generally no longer need one. The situation, incidentally, applies only to the United States and it is not common practice anywhere else in the world. This anomalous state of affairs is the product of marketplace economics that began to develop some forty years ago.

In 1948, in two civil anti-trust cases, ASCAP was judged to have violated the anti-trust laws in its licensing of theaters. The decision, in part, resulted from the fact -- then -- that motion picture theaters, producers and music publishers had common ownership. This is not true today for motion pictures and it was never the case for television! Moreover, in the 1940's, ASCAP had an exclusive grant of rights from its members, but, as the Court of Appeals in the Buffalo case took pains to point out, that is not the case, today, for either BMI or ASCAP.

As a result of that judgment and, in effect, as a penalty, ASCAP and its members were prohibited from licensing motion picture theaters. The copyright law was not changed to include this "penalty" in 1948 nor, when the law was rewritten some 30 years later, was any prohibition against motion picture theater licensing included within it.

If anything is unjust, therefore, it is the fact that the "sins of the fathers are being visited upon their sons." ASCAP writers who weren't even born in 1948 are still being penalized for something that happened nearly 40 years ago. Worse yet, the bill's proponents are now attempting to use whatever logic may have existed for the initial penalty as justification to extend that penalty far beyond its original confines.

True, the broadcasters have repeatedly tried to claim that the current BMI and ASCAP TV licensing practices are also violative of the anti-trust laws. Over the years, several major lawsuits have been brought against the performing rights organizations by various television interests. Each time, the television broadcasters lost! Court after court on up to, and including, the United States Supreme Court, has upheld the current TV licensing system.

Another argument consistently raised by the proponents of S. 698 has to do with money. They would like you to believe that BMI is somehow feathering its nest with an unseemly proportion of every dollar it collects. Of the remainder, they loudly allege that a full fifty percent goes to the "big" Hollywood interests.

These charges are simply not true! To paraphrase an old adage, those sponsoring the bill just don't like to be confused by the facts. Incidentally, if it is wrong for the publishing companies owned by Hollywood studios to be paid for their efforts, then why is it not wrong for broadcaster-owned publishing firms? And, in case you were unaware of this, a number of the major music publishers are broadcaster-owned.

Frankly, I hope you are as weary as I am with this seemingly endless barrage of statistics. So, once and for all, let me say this clearly and for the record: BMI functions as a non-profitmaking organization. Its overhead fluctuates, depending, in part, on how much time it has to spend in court or hearing rooms, but, in spite of that, I can recall no time within the past two decades when that overhead has ever reached 20%. In fact, it has generally been far less, and for the current fiscal year, it is expected to be about 16%. The major portion of each dollar taken in as license fees is distributed in its entirety to those copyright holders whose works have been performed.

Also important, however, is the relative cost of servicing different portions of BMI's business. In fact, BMI, like most concerns, has different kinds of customers, including major customer groups, such as TV stations, cable television, cable TV programming services, radio stations and general licensees. These are not the only distinct classes but they do illustrate the point. Over the air broadcast accounts, which number in excess of 11,000 licensees, historically account for about 2/3 of BMI's revenue. If the broadcasters would focus on negotiating over licensing, instead of litigating and lobbying, then BMI's 16% cost-to-revenue would be much less.

Ultimately, the definition of efficiency inevitably involves comparisons. Measured by any other business, margins in excess of 85% are unheard of. Even if the most significant writer made a performing rights deal with an individual network, the attorney and auditing fees would probably exceed the 15% cost factor. The writer would still not have secured any performing rights beyond the one arrangement and each deal would have to be negotiated individually.

As for the remaining reasons given by the proponents to justify their proposed revision of law, these all fall into the same, general category. The system needs to be changed because they -- the broadcasters contend -- are unable to negotiate with us, or the producers, and must accept anything offered on a take-it-or-leave-it basis. History, however, simply does not bear these charges out.

I will use only the most recent BMI negotiations as an example. They began in the spring of 1985. For some time prior to that -- as evidenced by the _Buffalo Broadcasting_ case -- the industry had shown no interest in negotiating...only in litigating.

In 1985, however, after the Court of Appeals found in our favor, the situation changed and BMI once again began attempts to negotiate a new license with the All-Industry TV Music License Committee. We were continually rebuffed! We offered to submit any difference to _binding arbitration_. That, too, was rejected!!

Eventually, the parties did get together. On October 4, 1985, in a letter sent jointly to all TV broadcasters by BMI and the All-Industry Television Station Music License Committee, the TV committee said:

> "We are pleased to enclose copies of the new form of BMI-local television station blanket license agreement which is the result of many months of _negotiations_ between BMI and the All-Industry Television Station Music License Committee....._We think it is a good agreement and therefore strongly endorse it and urge that you execute and return it to BMI promptly_." (Emphasis added)

I think it is particularly interesting to point out, too, that at the very same time this letter was being sent, H.R. 3521 -- the House predecessor to S. 698 -- was introduced because, as its broadcaster proponents claimed, the parties were _unable_ to negotiate.

Several other things also occurred as a result of the negotiation. The "powerless" broadcasters "compelled" BMI to do the following:

a. Withdraw a contract that had been sent out to the industry a few months earlier.

b. Reduce a rate that was then in force.

c. Agree to seek modification of its Consent Decree so as to provide for a Rate Court procedure. BMI had previously proposed commercial arbitration which was flatly rejected by the Committee. Instead, they insisted on the Rate Court procedure...a procedure they have repeatedly -- and in testimony before you -- claimed as valueless.

d. Agree to a major, financial concession with regard to back fees. (The court had ordered that these fees be paid to us "promptly", but, as a part of license negotiation, we agreed to an eight month grace period.)

For broadcasters to now cry out that S. 698 is "essential" because they are "powerless" to negotiate with us is -- at the very least -- a blatant distortion of fact!

As for the broadcasters' contention that they have repeatedly -- and unsuccessfully -- tried to negotiate source licenses directly with copyright owners, it is a claim that is simply unbelievable. Composers, songwriters and publishers are businessmen whose income is derived from the sale or licensing of various rights for whatever price they feel is proper. And if any broadcaster made an attempt to obtain those rights directly -- and was turned down -- then, as the Court observed in Buffalo Broadcasting, no serious offer of money accompanied that attempt.

There is no question but that the proponents have a right to seek legislative reversal of what they view as a succession of unfavorable judicial decisions. Along with that right, however, they have a burden which they simply have not even tried to meet. Instead -- and for the past several years -- they have merely repeated the same tired arguments and allegations that have already been rejected. Repetition does not make them any more valid!

CONCLUSION

I don't think I need to dwell on the obvious. Most of you, I'm sure, realize that this bill -- if enacted -- will dramatically reduce the economic incentives that all creators now have. I believe you should know, too, that there will be an equally dramatic ripple effect into the overseas creative community. This is one area in which the United States presently enjoys a very favorable balance of trade. If the bill is passed, that balance will almost surely change.

Today, however, there is another -- perhaps less obvious -- issue that must take precedence in your deliberations. Is this really a matter with which this nation's highest lawmaking body should be concerned?

As you already know from the record, the parties have always before been able to resolve their differences at the negotiating table. Real negotiations, however, cannot occur until all parties accept the fact that the bargaining table is the end of the line...that it is there where differences can and must be resolved!! If I were a broadcaster at this time, and there was some chance -- regardless of how slight -- that Congress would step in and pass a law relieving me, in effect, of the necessity to negotiate, then, I can assure you I would wait it out as long as possible.

Senator **DeConcini**. Thank you, Mr. Cramer.

Ms. Prager.

STATEMENT OF A.H. PRAGER, CHAIRMAN AND PRESIDENT, SESAC, NEW YORK, NY

Ms. **Prager**. Thank you for allowing me to speak here today.

My name is Alice Prager. I'm chairman and president of SESAC, and my purpose today is to oppose the enactment of S. 698.

First, I should like to tell you something briefly about SESAC and it's history. My father, Paul Heinecke, was a German immigrant who came to America as a child. He spent his growing-up years on a ranch in the Dakotas. As a young man, he returned to Europe for his required music publishing apprenticeship. He later came back to the United States as the American director of Breitkopf & Hartel, then the largest European music publisher in the world.

My father believed in music as the international language. He paved the way for such new world performances as Sibelius' "Finlandia" and "Valse Triste," Ponce's "Estrellita," and Provost's "Intermezzo." He aided in the development and promotion of modern music masters such as Arnold Schoenberg and Frederick Delius. He was acknowledged in the Congressional Record of January 13, 1965.

In 1931, in the midst of the Great Depression, he founded SESAC to represent the rights of those European composers and authors who were not represented on the American scene at that time. Since its beginnings more than half a century ago, the size and diversity of the SESAC repertoire has grown steadily. We now license the performance rights of some 135,000 musical compositions which comprise more than 1,000 SESAC-affiliated music publishers' catalogs and the works of more 2,000 SESAC-affiliated songwriters, most of whom are Americans.

We are the second oldest and the smallest of the three major performing rights organizations in this country. Nevertheless, SESAC has blanket licenses with approximately 95 percent of all commercial television and radio stations in the United States. In addition, we license cable networks, hotels, nightclubs, sports stadia, amusement parks, and other nonbroadcast media. This is possible because of the intense activity of our affiliation department and its personalized attention to and promotion of our affiliates, copyrights.

Our publisher and writer growth is also due in no small part to the fact that the United States copyright law has permitted the forces of the free marketplace to function normally. The blanket license, because of its inherent efficiency both to those who create music and to those who perform it, has been virtually the universal norm. It functions effectively in the United States and throughout the world in those countries which do have copyright laws.

The stability provided by the functioning of this free marketplace has greatly contributed to the United States being the foremost creator and exporter in the world of intellectual property, including television programs and the musical works included in them. This has given us one of the few bright spots in our balance of trade position.

But now the All-Industry Television Music Licensing Committee has asked the U.S. Congress to intervene in this stable marketplace. It would compel the creators of music to license the performance of their music not to the actual users, the television stations, but rather to the program producers. As a result, most likely the outcome would be that composers would be forced into accepting one-time buyouts for their work. What a devastating effect this would have on the will to create new and worthwhile music; whereas, via the blanket licensing system, the creator is guaranteed continued payments for continued performances.

Source licensing, which S. 698 proposes to dictate, as the only way of doing business is already a marketplace option among other ways of doing business. To me, it just doesn't seem fair that Congress should, for the sole benefit of that segment of television station owners urging this legislation, take those additional options away. I'm convinced that congressional denial of these options would gravely hamper the freedom to negotiate that is enjoyed by every legitimate business. It would also wreak havoc on both television film producers and all those involved in the creation of music as well as its ultimate presentation to the American people. That, in turn, would in the long run also hurt the very people who now urge the passage of this bill.

I'm not a copyright lawyer. I'm a businesswoman. As such, I'm interested in upholding the rights which have been entrusted to SESAC by our composer, author, and publisher affiliates and to license their work to all music users on a fair and equitable basis. This has been SESAC's philosophy and drive since its inception by my father.

Only in a free enterprise system could SESAC, the only small, privately owned performing rights organization in the world, exist, compete, and grow. Only in a free enterprise system do the creators of music have a freedom of choice, an alternative of three performing rights organizations: ASCAP, BMI, or SESAC. Only in a free enterprise system do the users of music have a freedom of choice, through the option available in our existing performance licensing system.

SESAC's affiliates as well as I feel through the free enterprise system we are able to be here today to urge you to acknowledge that this system functions well and fairly. We can see no logical reason for its being changed.

Thank you.

[The prepared statements of Ms. Prager follow:]

STATEMENT
of
SESAC INC.

By:
A. H. Prager, Chairman and President

IN OPPOSITION TO S. 698

Hearing: November 10, 1987

SUMMARY OF STATEMENT OF SESAC INC. IN OPPOSITION TO S. 698

I. SESAC Background. SESAC, founded in 1930 to represent the rights of unrepresented European composers and authors, today represents over 2,000 songwriters and 1,000 music publishers, the overwhelming majority of whom are American.

II. S. 698 Would Create A Privileged Class By Abandonning 300 Years of Copyright Protection. Since the Statute of Anne, copyright laws have required payment for the right to copy. The right of public performance is one expression of that principle. S. 698 would exempt a small group of television broadcasters, who are the performers of music, from that 300 year old requirement. Broadcasters have always had the right to seek alternatives to the current system but have not sought those changes in the marketplace. Furthermore, in the twenty year process revising the Copyright Act, broadcasters never raised the issue of source licensing.

III. Television-Economics - Is Help Necessary? From 1978 to 1983 television revenues grew by 233%. From 1963 to 1983, the cumulative Consumer Price Index increased by only 228%. In five years, television revenue grew more than the CPI did in 20 years. Over the same time span, music licensing fees as a percentage of television revenue decreased. Fees grew as a result of the tremendous increases in television revenues. It is only fair that the creators of music share in the increased revenue of the user/performer of music. In 1986 groups of up to twelve stations owned 649 of 922 (70%) of U.S. television stations. Certainly such groups singly or in unison possess sufficient power to seek alternatives to the blanket license in the marketplace.

IV. Judicial Decision And Dominoes: Who Should Bear The Burden To Persuade. Many courts have found the blanket license legal and reasonable over the course of a 16 year challenge to its legality. $20 million which otherwise would have gone to songwriters has instead been spent on legal fees. These court cases established that the blanket license is used worldwide, is more efficient, cheaper and simpler than any other system and provides unlimited infringement free access to most of the music existing in the world today. Passage of S. 698 would place an unconstitutional restriction on the right of a property owner to transfer his rights in the manner he chooses, solely for the benefit of approximately 900 television broadcasters and not for the benefit of tens of thousands of songwriters worldwide or the public.

SESAC Inc. hereby expresses its appreciation to Senator Dennis DeConcini, Chairman, and to all the members of the Subcommittee on Patents, Copyrights and Trademarks of the Committee on the Judiciary of the United States Senate for the opportunity to submit this statement in opposition to S. 698 which would amend Title 17 of the U.S. Code.

* * *

I

SESAC BACKGROUND

SESAC was founded in 1930 by Paul Heinecke, a German immigrant and American citizen possessed with both a love of music and keen business acumen. In his twenties, Mr. Heinecke had been the American Manager of Breitkopf and Hartel, the largest European publisher of music in the world. A man of vision, he accomplished his goal of licensing European and American music domestically. He paved the way for American performances of Sibelius' "Finlandia" and "Valse Triste," Ponce's "Estrellita" and Provost's "Intermezzo" as well as the music of modern composers such as Arnold Schoenberg and Frederick Delius. He formed SESAC to represent the unrepresented publisher, composer and author. SESAC continues to fulfill Mr. Heinecke's mission more than a half-century later by finding, developing and protecting the rights of creative talent out of the mainstream of contemporary music capitols.

In its early years, SESAC was known as the Society of European Stage Authors and Composers--that connotation was discontinued over 45 years ago as the SESAC repertory became overwhelmingly Americanized. The many accomplishments of Paul Heinecke are detailed in the Congressional Record at January 14, 1965.

II

S. 698 WOULD CREATE A PRIVILEGED CLASS BY ABANDONING 300 YEARS OF COPYRIGHT PRINCIPLES

A fundamental principle of copyright since the Statute of Anne requires payment for the right to copy. The right of public performance, with its correlative right of continued payment for continued performance, is but another expression of that fundamental principle.

S. 698 would in practical effect, exempt television broadcasters who, in fact, are the performers from paying creators of music for the continuing use through public performance of musical works. This exemption would be accomplished by shifting the responsibility for that payment for performance to the producers of audio-visual works.

It has been claimed that such a precedent already exists for motion picture theatres. This position by television interests is an attempt to retry the *Buffalo Broadcasting* case, which they LOST! First, the motion picture theatre issue is a result of judicial decision under anti-trust laws. Second, in 1948, at the time of the *Alden-Rochelle* decision, the *Copyright Act of 1909* made the bundle of rights comprising copyright indivisible, and that is not the case under the current Copyright Act. It is, therefore, very doubtful that *Alden-Rochelle* has any application today given the free and unlimited divisibility of rights pursuant to the 1976 law.

Finally, as a result of *Alden-Rochelle* and the 1950 ASCAP amended consent decree, television broadcasters have had the right to seek out alternative licensing methods. That they have not done so is testimony to the efficiency and reasonable cost of blanket licenses issued by SESAC and its competitors. S. 698 is simply bad law that has no redeeming characteristics other than elevating the television broadcaster to a privileged class under the copyright law. We are compelled to point to the fact that the source licensing restriction on the manner in which a property right may be transferred was never raised by the broadcasters during the twenty years of studies of copyright problems and the extensive legislative hearings and deliberations that resulted in the revised *Copyright Act of 1976*. That fact alone speaks to the merits of the blanket licensing system.

III

TELEVISION ECONOMICS - IS HELP NECESSARY?

Television broadcasters enjoy revenues of more than 17 billion dollars annually. They need no help from government after receiving a license to broadcast. According to U.S. Department of Commerce figures, television revenues grew from 6.9 billion dollars in 1978 to 16.1 billion dollars in 1983, an unbelievable 233 percent increase in just five years.

According to the Consumer Price Division, U.S. Department of Labor, the Consumer

Price Index rose 228 percent during the period 1963-1983. In short, television leap-frogged a twenty-year cumulative CPI increase in but five short years. It is very important to note that the cost of music licensing as a percentage of revenue has decreased over the same time span. Can anyone seriously doubt that these vast advertising expenditures did not work their way into higher consumer prices?

Music licensing fees for television have grown but the fact is they have grown more as a result of tremendous revenue leaps by the medium itself than through any new or added charges for music access. There is no economic crisis facing the television industry--far from it--and to subscribe to the theory of replacing blanket licensing by source licensing would only lead to more far-reaching inequities over the long term for creators, particularly those in the initial stages of their careers as composers and authors of music.

It is only fair, and certainly reasonable, that creators of music should be protected by an organized system of licensing which attempts to maintain the real purchasing power of their royalty payments and to reflect through the years the real market value of their music--a system which affords copyright owners a fair return for their creative work.

Is the television industry suggesting it alone should possess the power to maintain a constant value of its revenue stream? S. 698 seems to stand for that proposition. Or, is it that having failed to exert oligopsony power in the marketplace or cause it to occur through the courts, this governmentally created and licensed industry can only achieve its goals in a political context? The discussion of a free marketplace for music is historic in its every nuance. For television broadcasters to assert this Brave New World of music licensing as a free marketplace for composers seems rather to say, music composed in the television marketplace should be free! Doublespeak is one characterization which might apply to the naked assertions in support of S. 698.

Composers and authors of music have all benefitted from the freedom in the marketplace of the blanket licensing system. New talents are emerging and have recently emerged and they are and will be well served through that system. It rewards them by continuing payment for continuing performances. It is a democratic free-enterprise way of life in licensing performing rights. It provides a form of capital investment for the future creativity of music and its impact on the national and global economy must be recognized. The key is that the system of blanket licensing by the performing rights organization is the most effective means of keeping the domestic and international music economy alive and well. Otherwise, to accommodate the broadcasters, where no accommodation is necessary, through the mandate of source licensing is to court chaos in the licensing marketplace both domestically and internationally.

Another viable and useful economic consideration is a counting of heads, so to speak. According to Television Factbook 1985, 895 licensed stations were operating, 158 groups owned 592 stations or 66 percent of the total. A group is two or more. Then came the deregulatory 12-12-12 ruling, raising the group ownership limit from 7 to 12 stations. In one year, again according to Television Factbook 1986, television stations on the air increased to 922. More dramatically, group ownership jumped to 649 stations, 70 percent of all stations, under the control of 164 groups. The obvious is now commonly recognizable--media concentration is rapidly expanding in television.

It hardly seems necessary to detail the numbers of composers, authors and publishers who share annually from television license revenues attributable to non-network syndicated programming. Just for the record, however, SESAC which has among its affiliates music publishing companies affiliated with Warner Brothers and Paramount, allocated syndicated television royalties to 37 writers and 49 publishers in 1985, covering 356 uses, for which the performance total would be geometrically higher in number. Those figures showed greater participation by writers and publishers in 1985 over 1984, yet fewer uses. This data example while certainly not exhaustive, points out a fact of audio-visual music usage SESAC believes common to its two larger competitors as well; there is a constant rotation of author and publisher particpants in television performance royalty distributions. That data demonstrates again the genius of the blanket license which provides unlimited infringement-free access to the repertories of the performing rights organizations.

As Madison stated in The Federalist No. 43 in support of exclusive rights for authors and inventors, "The public good fully coincides with the claims of individuals." Francis Bacon could have been describing the shared growth of creators and users alike to the ultimate public benefit under blanket licensing when he stated, "That which is most useful in practice, is most correct in theory." Blanket licensing strikes the balance in the marketplace between creators and users.

IV

JUDICIAL DECISIONS AND DOMINOES: WHO SHOULD BEAR THE BURDEN TO PERSUADE?

Suffice to say the Buffalo Broadcasting case has been analyzed, discussed, presented and dissected ad infinitum. However, it is but one case of a continuum which began in 1969 with CBS v. ASCAP and BMI. In the 16 years from the filing of the CBS case to the denial of certiorari by the Supreme Court in Buffalo Broadcasting in early 1985, the attack was the same, the issues were the same, the result sought was the same and the motive the same: destroy the blanket license and with it the only true equality of bargaining position for the creators.

An estimated 20 million dollars which should have gone to the creators of music, as envisioned by the Constitution and the Copyright Act, instead have been spent on legal fees in expensive civil litigation. Songwriters may very well wonder, what price victory?

S. 698 is seductively simple! Provocative title: "Copyright Reform!" To mandate source licensing through this amendment is to dismantle and eventually destroy the economic structure of the copyright system, not to reform it!

The blanket license is perfectly legal. It performs a difficult function more efficiently and more inexpensively than any other method. It is universally used by every performing rights organization in the world for the best of reasons: it delivers two products simultaneously, complete and unfettered repertory access without regard to transfers of copyright ownership and complete freedom from claims for infringement. That is the service and product of any performing rights organization. Very few users, broadcast and non-broadcast, have music use patterns which are unchanging. The true genius of the blanket license is the total freedom to choose and use from the repertory.

You are now presented with a bill to effect a major change in American Copyright Law, a fundamental move away from a principle of law, continuing payment for continuing use. The success of a syndicated television program assures the success of the creator of the music on that program through this principle. Blanket licensing works in the best interests of both the creator and the user. A change, if anacted, would begin an unbroken line to your doors seeking the simple reform of equal treatment. Immediately after enactment of S. 698, it would seem logical for the television networks to come next, as Buffalo Broadcasting retraces itself to its genesis, CBS. However, even if there were no domino possibility here, it is time the proponents of draconian destruction of property rights bear the burden of truthful persuasion.

That burden can only be met by a fulsome and thorough tour of their "Brave New World" of music licensing. And, when finished--an answer to the ultimate question--if all this is so, why have you not used the economic resources at your disposal to accomplish it without tearing at the fabric of Copyright Law? The failure by television broadcasters to pay the sums of money to exercise alternative market choices now existing hardly provides a truthful foundation to support a need for what is being hailed as "Copyright Reform!" The reality is that this bill would provide the most highly regulated restriction on the transfer of a property right for the singular and express benefit of the television broadcast industry, not for the public good and certainly not for the good of the creator.

CONCLUSION

SESAC strongly opposes S. 698 as constitutionally defective legislation contrary to the present and future public interest of the United States. It is narrow special interest legislation with domestic benefits only for the very privileged few holding FCC licenses and all to the detriments of the present and future creative processes in music.

Finally, the proponents of this legislation cannot make their case in any way other than the shifting of a performance responsibility in a manner totally destructive of historic copyright principles.

American authors and composers of music deserve better than that.

SUPPLEMENTAL STATEMENT OF A. H. PRAGER,
CHAIRMAN AND PRESIDENT OF SESAC, INC.,
IN OPPOSITION TO S. 698

I would like to take this opportunity to thank you again for allowing me to represent my firm, SESAC, at the hearing Tuesday morning, November 10th, re S. 698--"source licensing." I would also like to thank you for this opportunity to supplement my testimony since it allows me to address certain issues which, due to the time limit, I was not able to include in my oral statement.

We are a very small business and, as such, are always affected by what happens to our larger competitors. In this instance, our very existence is at stake, so you can understand my concern over the possibility of such an act as S. 698 being passed. The tendency of expressing the pros and cons in an issue such as this is that the focus is almost always on the biggest examples and the largest numbers. While great importance lies in dealing with the large items, I feel we must also interject our facts into this situation, dealing with small business. Facts which I feel have not yet been brought out at all. In a way, we are a little like Budget or Dollar car rental, with Hertz and Avis in our marketplace! The important difference here is that when choosing Hertz or Avis--or a Budget or Dollar--the user of the rental car honors his/her contract, having voluntarily chosen the car they wish to rent, and pays his/her contract fee. If they do not pay, the rental company takes back the car; the premise being if they are using it and have a contract to do so, they must pay for the use.

The proponents of S. 698 declare how they are most willing to pay the writers and publishers to compensate them for the usage of their works. Nice words. However, as a matter of long outstanding history with us, their actions certainly do not reflect their words. If they did, then why is it that when ASCAP and BMI are in negotiations with the broadcast industry, or in court (as during the recent Buffalo case), a not insignificant number of broadcasters simply refuse to pay SESAC until their grievances with ASCAP and BMI are settled? This, notwithstanding the fact that SESAC is not involved (and in the case of Buffalo was not even a party to that lawsuit). I respectfully urge that the Subcommittee, in considering S. 698, fairly consider the disastrous effect its enactment would have on a firm such as ours.

We cannot hold back on our payments to our writer and publisher affiliates. Their music is still being performed by the broadcasters during this time. It proves very difficult for a small business to remain competitive in the marketplace when payments are being withheld to us for long periods of time. The broadcasters, however, including the small business broadcasters, continue to sell their service and increase their revenues during this time. As a matter of fact, SESAC had to roll back its revised performance license rate for the entire television industry for three years because of the Buffalo case. During the time period of 1980 through 1983, the total revenue in the television industry grew from 8.8 billion dollars to 16.1 billion dollars --an 83% increase. SESAC, on the other hand during these same three years, was trying to get the industry to honor and pay on existing contract agreements they already had with us.

As the Subcommittee knows from our previous statement, SESAC is by far the smallest of the three performing rights organizations. Our gross income last year barely exceeded six million dollars. My guess is that we are considerably smaller dollar-wise than a great many television facilities! When compared to that segment of the television industry which is pushing for source licensing, we are like a guppy in the middle of the Pacific Ocean.

Notwithstanding our minuscule income compared not only to that of ASCAP and BMI, but also to the television industry itself, it probably costs us as much as our competitors to license broadcasters and pay our publisher and writer affiliates their share of the license fees we collect. For example, the paper on which we write a SESAC performance license calling for an annual fee of $1000 costs just as much as the paper for an ASCAP or BMI license which for the same station might call for a $50,000 annual license fee. (And, it costs SESAC, just as it does ASCAP and BMI, to appear at hearings on source licensing and to seek legal advice on the matter.)

In short, because of the very nature of our business, it costs SESAC just about the same as it costs ASCAP and BMI to negotiate our performance licenses which are the source of income for our affiliates--but the dollars those licenses bring in are significantly lower. And, because the dollars which SESAC licensees bring in are so small compared to ASCAP and BMI, SESAC and its affiliates just don't have the cushion which our competitors probably have to allow for survival in the event of a radical downturn in those dollars. To be perfectly blunt, it's possible (if not likely) that our competitors could survive the percentage decrease in their revenue resulting from mandatory source licensing legislation as the only way to do business. A similar percentage decrease in SESAC's revenues would be disastrous to us.

As I testified on November 10th, it's only because of our free enterprise system and our right (until now) to negotiate freely with our customers that an organization such as SESAC has been able to survive. Through this system we serve not only the needs of music users as a competitor of ASCAP and BMI, but also the needs of our publishers, authors and composers who, for whatever reason, have found that we can better serve those needs than can our competitors. On behalf of both my company and those "small" publishers, composers and authors, I plead with the Subcommittee that it not endorse this proposed legislation which would severely inhibit the opportunity for free marketplace forces to function normally. In effect, I plead that the Subcommittee allows us to continue to exercise our right to survive on the basis of our ability to serve both music user and music creator. I plead also for the rights of all those involved to freely negotiate and arrive at agreements without unnecessary and unwarranted governmental interference.

Permit me also, please, to make a few other observations.

First, the Subcommittee may recall that during the November 10th hearing, the videotape shown by the broadcasters strongly contended that the television program "Jeopardy," one of the top syndicated shows, hardly used any music other than its theme. Upon returning to my office and going through the latest performance information documented by SESAC, I found that the musical composition "Convoy," from the movie of the same name, written by Louis F. Davis and Bill Fries, SESAC-affiliated writers, and published by SESAC publisher affiliate American Gramophone, had in fact been performed on that show. If SESAC, the smallest of the three major performing rights organizations, had a performance of a musical composition that was not written for this show, I think it fair and reasonable to assume that this syndicated television program uses much more music not written for it than the broadcasters' videotape would have us believe.

Also mentioned as a top syndicated show was World Federation Wrestling. Here, too, SESAC music was used! Jimmy Hart is a popular wrestling personality, as well as a composer affiliated with SESAC, and his works are performed on that syndicated program.

Second, our licenses with the broadcast industry are voluntary on the part of the user. If a broadcaster does not perform the copyrights we represent, he does not have a need for a SESAC license. If that station does use our music, we advise them that a license is necessary to continue to use the music we represent. After correspondence and/or discussion with the facility, we send a license. The stations have invariably chosen a blanket license for the convenience and availability it provides them as well as for the reasonableness of the fee.

There are several other reasons why our licensees prefer the choice of the blanket license over other availabilities.

With writers and publishers having the ability to switch affiliation from ASCAP to BMI to SESAC, or vice versa, it is difficult to know just with whom which writer is affiliated at the time of contract signing. This is true particularly with a great many of the new young writers with whom we deal. The practicality of a blanket license for a station makes a great deal of sense--as well as saves them dollars. Dollars insofar as the time and labor involved for a station to find out "who's on first," second, or third, when did they change and for how long, etc., etc.

Whatever the case may be concerning ASCAP's and BMI's method of charging performance license fees, the fact is that SESAC has never and does not now base its fees on a broadcaster's income. Our broadcast performance fees are fixed and apply to all stations falling within certain well-defined categories, and are both logical and equitable. We base our fees simply on the station's highest thirty second spot rate and the population of the F.C.C. city of license.

A commercial television (or radio) station's advertising rates are a direct indicator of the market value for each individual broadcast service--or--what is the cost of buying the service that broadcast stations offer to the public? The recent testimony of the advertising panel stated the situation well--"the price for that broadcast time presumably covers a station's cost, including the cost of obtaining a blanket performance license." It is without question a cost of doing business that should be included in the consideration of the pricing of their service.

The other relevant factor we use in determining the value of a public performance of music would logically be the size of the "public." Here, SESAC uses the U. S. Census population for the city in which the station is licensed to operate by the F.C.C. We then place these factors into one of our eight market classifications to arrive at a standard rate schedule.

With respect to SESAC's role and the effect S. 698 would have on us, I think it worth bringing to the Subcommittee's attention that SESAC has not raised its fees for television stations, as I have previously stated, since 1983. Before that we had not raised them since 1978. I respectfully submit that this is a pretty good track record in establishing our willingness and ability to deal with the broadcasting industry on a fair and equitable basis, particularly since we developed and enlarged our repertory considerably during this period.

Finally, the composers who are affiliated with SESAC choose our methods of payment and our highly personalized service over that of the larger performing rights organizations after thorough consideration. After all, in the United States they are free to make a choice. To subject them to a system of payment based on source licensing, with the choice removed from them, does not sound like the way our American system works. If it did, we would expect Congress to get involved and return the choice to the people!

The facts I have stated, and these are just a few, will, I hope, help you to understand us, and help to clarify why SESAC would not, and could not, survive with only source licensing as the one and only way to license a music user.

In retrospect, how would it be possible to locate every writer or publisher to make a deal every time their work was to be used in a program? How would a creator be able to create with all these users chasing him down to pay him for his music? Of course, he would have a business manager! The business manager would be the agent and make the deals. Isn't that what we have now?--with the exception that the writer now has a choice of "agents," ASCAP, BMI, or SESAC to go to, whose entire expertise is in handling his business. Of course, on the chance that the writer simply couldn't afford to hire a business manager--do you really believe that whoever would be responsible for paying the writer would search for the writer, his widow, or whomever, to be sure to pay them? Would this system really promote the new young creators to write and publish and record their works so that they could earn their living in this profession, or would it turn them off and stifle their creativity due to no possibility of a decent income?

In conclusion, I know that the Subcommittee intends to do what is best and what is fair for all concerned, and ultimately what is best for this nation and all its people. Towards that end, I simply ask that the proper and legitimate interests of "small" businesses such as SESAC and the "small" publishers, authors and composers it represents, as well as the history of SESAC's amicable and fair dealings with its customers over the last fifty-seven years, be taken into account. In doing so, I am confident that the Subcommittee will conclude that governmental denial of the right of people to negotiate with one another in as many different ways as lawful and permissible is not the proper function of government.

Most respectfully submitted,

ALICE H. PRAGER

ALICE H. PRAGER is the Chairman of SESAC Inc., America's second oldest music licensing firm, located at 156 West 56th Street, New York City. Mrs. Prager holds a BA degree in radio and television from Russell Sage College, Troy, New York, and completed graduate work at New York University's Graduate School of Business Administration.

A. H. Prager joined SESAC in 1947 and moved into administration and sales in the early '50s. In 1956, she was named a vice president and elected to the board of directors. Ten years later, she was appointed executive vice president and managing director, a position she held until February 1973, when she was elected SESAC's president. She was elevated to the post of Chairman in April 1978.

Mrs. Prager is presently on the board of the Bedside Network and the Country Music Association; a member of the International Radio and Television Society, the American Institute of Management, the American Women in Radio and Television, the International Association of Women in Radio and Television, the Advertising Women of New York, Broadcast Pioneers, Women's Forum, the National Academy of Recording Arts & Sciences, and has been elected a lifetime member of both the Country Music Association and the Gospel Music Association. She has been made honorary citizen of the States of Tennessee and Florida and been made an honorary Kentucky Colonel. She is the founder of The Duke Ellington Cancer Center, a facility at St. Luke's-Roosevelt Hospital Center in New York City for indigent musicians in need of cancer treatment.

Mrs. Prager is listed in the National Register of Prominent Americans and International Notables, Who's Who of American Women, Who's Who in the East, Who's Who in Business and Commerce, Foremost Women in Communications and innumerable music industry trade references.

SESAC INC. / WORLD HEADQUARTERS 156 West 56 Street, New York, NY 10019 • (212) 586-3450
REGIONAL OFFICE 11 Music Circle So., Nashville, TN 37203 • (615) 320-0055

BEST AVAILABLE COPY

Senator DeConcini. Thank you, Ms. Prager.

Mr. Post, have you ever been contacted to negotiate a source license?

Mr. Post. No, but I'm available.

Senator DeConcini. You're available?

Mr. Post. You'd better believe it.

Senator DeConcini. OK. [Laughter.]

The three representatives here, I'd like to pose this question to you: you make an argument that says we should leave it like it is and, as far as apples and oranges or the carburetor in an automobile, those arguments don't hold much to me because this is such a very unique situation, it seems to me. So those arguments don't mean as much as the argument that troubles me, the one of fairness that is raised.

Now I realize the hostility in the industry here, but based on the fairness, when you see that of the top 10 programs watched, only 2 of them have any music, and yet you collect a fee for the volume and on the revenues of the other 8 programs that are sold. What's fair about that?

Mr. David. Well, if I may——

Senator DeConcini. Mr. David?

Mr. David. First, at this time there has been an interim decision by Judge Dolinger, who will try the case in its final form this January 19, we do not get a percentage of their net income. We are now on a flat sum. The judge has ruled that on an interim basis. We don't know——

Senator DeConcini. That's what you're collecting now?

Mr. David. A flat sum. We're off the percentage basis; have been since what year? The last 4 or 5 years. Since 1983 we have not been on a percentage basis. Even though that's been said, it is not accurate and hasn't been for some time.

As far as ASCAP is concerned—and I think it probably runs true to all three of our groups—about 25 percent of our members receive income from local television for the syndicated program show. That's about 1 out of every 4 writers.

Senator DeConcini. How many does that amount to in your organization?

Mr. David. I could find out.

Senator DeConcini. They indicated 700 or something. Is that——

Mr. David. It's obviously much more than that.

Senator DeConcini. It is?

Mr. David. It has to be if I'm saying 25 percent. Those were the figures that were given to me.

Now do you realize in ASCAP—and I'm sure it's the same thing with SESAC and BMI—most of our writers are really not full-time professional writers. Our doors are open to all—many of our writers teach for a living. Many of our writers do all sorts of things and write a song here and there. So there really is a small group of professional writers who make their living as Mike does, as I do, as Henry Mancini does. We make our living writing. There's a small group of us.

If 1 out of 4, or approximately that, gets paid from ASCAP—and I'm assuming from BMI and SESAC—that's substantial. It's not just a little 15 percent, as we just heard.

Senator DECONCINI. You say it's 25 percent.

Mr. DAVID. About 25 were the last figures given to me.

Senator DECONCINI. How many people does that amount to?

Mr. DAVID. Well, if we have—what—35,000 writers——

Senator DECONCINI. Is that what you have in members?

Mr. DAVID. It's about 4,000 out of about 20,000, I guess. So what is that? Twenty percent. I was given 25 percent.

Senator DECONCINI. Excuse me, how many members do you have?

Mr. DAVID. We're talking about writers now.

Senator DECONCINI. Writers?

Mr. DAVID. There would have been about 20,000.

Senator DECONCINI. You have about 20,000?

Mr. DAVID. Yes.

[Mr. David was speaking of an earlier year. In November 1987, ASCAP advised the committee it had about 27,000 writer members.]

Senator DECONCINI. And 25 percent of those——

Mr. DAVID. Approximately that.

Senator DECONCINI. How about BMI?

Mr. CRAMER. The percentage is probably about the same, but what is significant, Senator, is the constant changing in that makeup of that number. It's not always the same people who——

Senator DECONCINI. I understand.

Mr. CRAMER [continuing]. Earn that, just like the people who were the top leaders in the football field 10 years ago aren't the same ones today. Ten years ago Mike Post didn't get a dime; now he's earning money.

But I'd like to come back to the fundamental question, sir, that you raised, and that is the issue of fairness.

Senator DECONCINI. Right.

Mr. CRAMER. It seems to me that was the issue that was directed to the court in the *Buffalo* case, not that that's determinative because this is the Senate, but if there are alternative methods of licensing, if you're not forced to take a blanket license and you do have alternatives—and at the moment there are four alternative licenses and the court reviewed every one of those and said, "Yes, they're real alternatives," and there may be more alternatives than just these four. Ingenuity is unlimited.

But what this bill does is simply say there are no alternatives; there's only one choice. What we're saying is, yes, you can engage in source licensing right now.

Senator DECONCINI. Based on that, why do you think that there is no source licensing to speak of, because the industry refuses to attempt to do it? Is that what you think?

Mr. CRAMER. They never attempted to do it. You just heard Mike Post say nobody ever asked him. The answer is—I told you that I testified I'm willing to discuss that issue with anybody, and I got off the stand and for 5 years nobody ever talked to me about it.

Senator DECONCINI. Are you willing to see the law require that——

Mr. CRAMER. It's not necessary——

Senator DECONCINI [continuing]. There be a cutout or a credit of payment to a source licensee.

Mr. Cramer. Speaking for myself, I can say that I don't think that's necessary. It's there. That's something that should be negotiated. If they want to negotiate it, fine.

Senator DeConcini. Wait a minute. Wait a minute.

But it isn't there? It's only there if you want to agree to it?

Mr. Cramer. No, because they didn't agree. That was part of the negotiations, Senator.

Mr. David. May I answer?

Senator DeConcini. Wait. Let me finish with Mr. Cramer.

Mr. David. Oh, excuse me.

Senator DeConcini. In fact, are you telling me that you would agree to a cutout or a credit basis as you had before if they wanted to agree to it? Is that right?

Mr. Cramer. I'd say as part of the negotiations, yes, we would sit down and discuss that, and I offered to do so.

Senator DeConcini. Now if there's any merit at all to the argument that, hey, there really is only one way to operate now and that is a blanket license, just hypothetically, and if the Congress decided that, well, there ought to be an encouragement for the source license because there's no indication here that anything else is available, is working—it may be available but is working—if Congress were to create legislation that would, in fact, require a credit toward the blanket license for any source licensing that had been negotiated, what's wrong with that? Anything?

Mr. Cramer. I'll let Mr. David answer.

Senator DeConcini. Mr. David.

Mr. David. First, the per-program license that is under discussion is the carve-out license. That's what the per-program license is. Carve-out and per-program are one and the same thing.

That's one of the licenses that we have been negotiating with the broadcasters about and had agreement with them for all these years and we're in the process of negotiating, and Judge Dolinger has come down with a decision which has given them a big opening in the per-program license field.

As far as the negotiations go, I think everyone forgets that we at ASCAP—I think we're all the same—we go into a negotiation with our hands tied behind our backs; ASCAP does. If we can't make an agreement with these people, we must let them use our music——

Senator DeConcini. Wait a minute. I don't understand that. Can they use your music without paying you anything?

Mr. David. They have to go to court. Yes. We are not permitted to take our music away from them. They have a license automatically even if we don't have an agreement to use our music. Then we go to court and Judge Dolinger, or whoever the judge is, will finally decide what the proper fee is.

But we can't say to them, "No, sir, if you don't want to use our music at a fee we like, don't use our music," as though we were going in to buy the car Mr. Arries suggested. We can't do that. They take our music, they use our music. So we go in with our hands tied behind our backs all the time. We are not in the power position in any of these negotiations; never have been, and I assume it's unlikely we will be.

Senator DeConcini. That argument doesn't make a lot of sense to me, Mr. David. It seems to me that you're in a very powerful position because if you decide—if they decide to go ahead and not contract with you, you have successfully time after time proven that you have a right to be paid for that music, so they don't dispute that; they're willing to pay for it. They just don't want to pay as much on a blanket basis. Isn't that really what it boils down to?

They're not saying—you know, the argument that—Mr. Post says that they want to use the music for nothing. I don't think that's what they want to do. I don't think they're trying to get it for nothing. They don't want to buy 4 million songs when they're only going to use 2 out of 10 programs that they want the music for.

Mr. David. I'm inclined to agree with Mike Post because I don't think they want—they don't care who pays for the music if it's not them. They would like the producers to pay for the music.

Mr. Post. Mr. Chairman, may I give you an example of misinformation?

Senator DeConcini. Yes, we need those examples.

Mr. Post. These guys just sat here and named off 10 top shows.

Senator DeConcini. Right.

Mr. Post. And then you had one fellow sit here and give you an opinion that the music on "The Cosby Show" doesn't mean anything. Well, one of the top 10 shows they named off was "The Donahue Show." I worked a long time on the music for "The Donahue Show." [Laughter.]

I really did, and I think it's pretty good, as a matter of fact.

Now, you know, I came in here 1½ years ago and I saw these same fellows sit up here and do something they thought was real smart, which was to play an example of how insignificant what Hank Mancini and what I do and what Earl Hagen and what Hal David do, what we do—how it really doesn't matter to their programming and how they're being just beat up in order to use our music.

They sat here and played an example of how insignificant music is or how incidental it is. They sat here and played the theme from the "Andy Griffith Show," and everybody in the place smiled and everybody knew it was the theme from the "Andy Griffith Show."

I think this was actually in the House. One of the Congressmen said, "You know, gee, I haven't made up my mind on this, but if you're playing that as an example of how this doesn't matter, I think you guys are going the wrong way. I wish somebody would write a piece of music for me that was instantly recognizable" and people knew that that was Dennis DeConcini's theme.

I don't know about Hank, but I'm available. [Laughter.]

Senator DeConcini. Do I have to get a blanket license?

Mr. Post. Hell, no. [Laughter.]

Senator DeConcini. OK.

Mr. Post. We can talk. We can talk, just you and I. [Laughter.]

Mr. Cramer. Senator.

Senator DeConcini. Mr. Cramer.

Mr. Cramer. Going back to your specific question about whether the Senate could mandate such a kind of license and what it would do, Mr. Arries in his prepared statement said, acknowledging that per-program license is a viable alternative—and I'm quoting directly from the statement he filed today on page 3—"Also, a per-program license would allow TV stations to negotiate directly with composers for the rights to the music in locally-produced programs and not pay ASCAP separately for those rights." That's a fact, and that exists today.

So I say to you, sir, since that exists, the only question there is: What is the rate they should be paid for per program? So the mechanism which would enable them to get this carve-out, the per program used in combination with something else, exists today. They know it exists today. It's here in their statement.

Senator DECONCINI. Are you telling me that if they go to Mr. Post and make a deal, that they can get a credit from BMI for the amount of money they directly pay to him?

Mr. CRAMER. Used in combination with a per-program license, they would be able to effectuate that.

Senator DECONCINI. They could?

Mr. CRAMER. Yes, sir.

Senator DECONCINI. Under the present agreement they have with you?

Mr. CRAMER. They say so, and that's what they've said here.

Senator DECONCINI. Now what about the floor that they keep talking about? Is that true? Is that your position—that you have to have 75 percent?

Mr. CRAMER. That's not something that BMI was involved in. That's part of the negotiation which I don't know anything about.

Senator DECONCINI. Mr. David.

Mr. CRAMER. That was subject to some nondisclosure agreement so they wouldn't tell me.

Mr. DAVID. What's the question? Forgive me.

Senator DECONCINI. The question is: On the basis of a carve-out, if that's the correct term, is there a 75 percent floor that you're insisting on?

Mr. DAVID. Well, as you know, Mr. Chairman, we're going to trial in January, and our lawyers suggested that I don't get into the specifics of the negotiations. I'd be glad to speak to you privately.

But I would say this: If we offered them a 25-percent diminution for the carve-out, the per-program license, I think that's pretty terrific. I wish I could get a 25-percent diminution when I go out to buy things. That was right in the negotiation. That doesn't mean that that was the end product.

Senator DECONCINI. But, you see, if we really believe—if we're all sitting here saying there really are four alternatives, they're all available, and there's only one being used, only one really effectively being used, the question that I have is: Is there something to do, if we're going to do anything, that would encourage or make available other alternatives?

It seems to me like one of the problems is, the broadcasters aren't willing to go out to the market, to go to Mr. Post and make it so attractive that he can't turn down the deal. They haven't been willing to do that, or at least there's no evidence of that.

Is there some basis for giving an alternative, a true alternative? If the market isn't there with an alternative, then they don't have an argument that you guys have really got the only game in town.

Mr. **David**. First, I think the market is there with an alternative, and we're talking about price now. This January—I don't know how long the trial will last—that is going to be addressed, all the facts and all the arguments, and something is going to come down. In the interim decision that just came down 5 or 6 months ago they were delighted with the results.

Senator **DeConcini**. Do you mean on doing away with the percentage and——

Mr. **David**. And they also got a substantial change in the per-program license—substantial.

Senator **DeConcini**. Let me go to one other area. Your testimony almost 10 years ago now in the *Buffalo Broadcasting* case indicated that in 1979 there were 12 out of the top 15 television music publishers who were subsidiaries of 8 movie studios. How many of the top 15 music publishers receiving money from the television blanket licenses are affiliated with movie producers?

Mr. **David**. I would have to get—I don't know. I hear 13 percent of our publishers.

Senator **DeConcini**. Of yours, of ASCAP's?

Mr. **David**. Of ASCAP—are owned by the major studios involved in local television. Most of the music played on local television is not owned by the major studios.

Mr. **Post**. What's more important, too, Senator, is——

Mr. **David**. I beg your pardon. Thirteen percent of the money is paid to them.

Senator **DeConcini**. Thirteen percent of the moneys collected go to these——

Mr. **David**. Big studios.

Senator **DeConcini**. How many? How many big studios?

Mr. **David**. We'll get you that information. I don't have the actual number.

[The following information was subsequently submitted for the record:]

In ASCAP's fiscal survey year 1986 (October 1, 1985–September 30, 1986), ASCAP publishers associated with the 10 member companies of the Motion Picture Association of America received just over 12 percent of ASCAP's distributions to its members for local television performances.

The 10 MPAA companies are Columbia Picture Industries, Inc.; Walt Disney Productions; DeLaurentis Entertainment Group, Inc.; Century MGM/UA Entertainment Company; Orion Pictures Corporation; Paramount Pictures Corp.; Twentieth Fox Film Corp.; United Artists Corp.; Universal City Studios, Inc.; and Warner Bros., Inc.

Senator **DeConcini**. How about BMI?

Mr. **Cramer**. I really don't have the exact number. Again, that would be furnished clearly for the record.

Senator **DeConcini**. You can supply it for the record.

[The following information was subsequently submitted for the record:]

Our records do not generally contain information regarding the corporate parentage of affiliated publishers, but, after reviewing a list of 15 publishers with the greatest theme and background earnings aggregated over the most recent four distribution quarters, the following appears to be the case:

Six are entirely motion picture company affiliated.

Six are, or were until recently, owned by companies with substantial broadcast station holdings.

Three are owned by companies that, to the best of our knowledge, have no corporate relationship to either broadcast or motion pictures.

Mr. **Cramer**. But—well, I don't want to comment further, but that assumes—I'll let Mr. Post answer, but that assumes that the money that they earn is on the music in the shows which they control.

Senator **DeConcini**. Sure.

Mr. **Cramer**. That is not the case.

Senator **DeConcini**. Yes, I understand that.

Mr. **Cramer**. A substantial portion of the money earned for television, for example, by one of the largest, if not the largest, publishing company for performances on television comes from shows in which the motion picture company has no interest. There is a tremendous amount of feature and background music used out there which is not in the shows owned by television companies.

The information given to you was totally wrong and misleading. It will be clarified and has been clarified before, but they just choose to ignore it. It will be clarified again. I hope this time it will finally sink in. Not so.

Mike has a very good comment. I hope he would answer.

Senator **DeConcini**. Do you want to say anything, Ms.——

Ms. **Prager**. Just that off the top of my head I know Warner's and Paramount have publishing companies affiliated with SESAC, so we are involved with some motion picture companies, too.

Senator **DeConcini**. Mr. Post.

Mr. **Post**. This is another example of half information and misinformation, in my opinion. All the shows that I listed in my credits I have half the publishing on. I do use—I do have a deal with Warner Brothers Music, Warner Brothers Studios, that administrates my publishing interest. Guess what? I don't know and have never done a Warner Brothers picture or television show. It just doesn't work that way.

You were also told and there was testimony given here that most of the composers that work in television are employees, full-time, salaried employees of studios. That is a lie. That is not true. I've never been a full-time employee of any studio or any production company. I know that it did take place 25 or 30 years ago, but I've never even known anybody that was on staff. There is no such thing as staff.

Senator **DeConcini**. You're telling me that there are no publishing, music publishing—publishers who have people on payroll that write music for them?

Mr. **Post**. I am telling you that no one that does the music for television that I'm aware of or for movies is under contract to a publisher owned by a studio and has all his salary paid by that publisher. Yes, sir, that is not the case.

Senator **DeConcini**. So you're saying, then, back in the *Buffalo* case where they said 12 of the top 15 television music publishers were subsidiaries of 8 movie studios, your answer really, then, is so what, because none of them employ full-time songwriters; is that what you're saying?

Mr. **Post**. Yes, that's exactly right. That's exactly right.

Mr. **David**. May I read something from the *Buffalo* thing that deals with that point?

Senator **DeConcini**. Sure.

Mr. **David**. This is in their final decision:

> Nor is the alleged unwillingness of the producers to undertake source licensing [page 33] established by the fact that some producers own music publishing companies that receive royalties as their distributive share of the fees stations pay for the blanket license. The undisputed evidence shows that these fees are far too small to persuade syndicators to refuse to undertake source licensing in the face of reasonable offers. BMI, for example, typically distributes to a publisher between 50 cents and 85 cents for theme and background music in a half-hour episode of a syndicated program shown on a single station. By contrast, the syndication licensing fee can exceed $60,000 for a single episode of a popular series shown in a major television market. Though some of the major producers that own music publishing companies have received more than $1 million in annual television distributions, those royalties are a small fraction of their syndication revenue.

Senator **DeConcini**. Thank you.

Ladies and gentlemen, let me tell you that I do have further questions, but time is running out.

Let me just set the record straight so you understand the process we're going through. I realize it's a nuisance to be brought back here every couple of years or so to raise this question, but I can assure you that if the shoe were on the other foot and you wanted hearings before this chairman, and I suspect anybody or almost anybody on the Judiciary Committee, that you felt the market was out of whack, that you needed adjustment in the copyright, this Senator would assure that you would get a hearing. That might be a burden, then, on the broadcasters or the motion picture producers, but I think that is our obligation.

What we do here will be determined on the merits, I believe, by the different members, but I'm sorry to put you to that imposition. I realize you don't get paid to come here. You get paid to write your songs and represent your people, but it's the only way we can make a judgment whether or not we want to report legislation.

Thank you very much.

Mr. **David**. Thank you, Mr. Chairman.

[Questions and answers, subsequently received for the record, follow:]

Response of Mike Post to Questions from Senator Thurmond

1. DO YOU UTILIZE THE SERVICES OF OTHER INDIVIDUALS IN PRODUCING MUSICAL COMPOSITIONS LICENSED THROUGH BMI? IF SO, ARE THESE INDIVIDUALS ACKNOWLEDGED BY BMI AS CO-AUTHORS OF THE COPYRIGHTED COMPOSITIONS THEY PRODUCE WITH YOU?

2. DOES BMI DISTRIBUTE A SHARE OF THE ROYALTY PAYMENTS ATTRIBUTED TO SONGS IN WHICH YOU ARE LISTED AS AUTHOR TO THESE INDIVIDUALS? IS THE PRACTICE OF USING CO-AUTHORS COMMON IN THE MUSIC INDUSTRY?

The matter of my staff came up when I testified before the Subcommittee against the source licensing legislation in 1986:

> As a point of personal privilege, if I may take 1 or 2 more minutes, I would like to tell you something that has come to light that I think is pretty interesting.
>
> I am told that last week the broadcasters had some investigators out in L.A. looking into the ways that myself and my partner do our business. Well, first of all, that is kind of flattering. I guess that may mean that the broadcasters felt that the testimony that I gave in front of the House subcommittee was effective.
>
> I have heard that they plan to come to the Senators one on one after this hearing, and basically say, "Hey, do not listen to this guy, Mike Post, because he has a staff of ghost writers, and he doesn't really write the music; he just takes all the credit for it."
>
> Well, I am honestly happy they decided to do this because it gives me a chance to tell you how our business works and how Pete and I have helped to change our business in a very positive way.
>
> Now, I do not know if Senators have the time to

> write every word of every speech that they make, or if they have --
>
> Senator Mathias. That is not a question you ever ask. [Laughter.]
>
> Mr. Post. Well, let me put it another way. I do not know if Senators have the time to do all the research on every bill that they vote on. Is that any better?
>
> Senator Mathias. That is better. [Laughter.]
>
> Mr. Post. That got a red light so it definitely --
>
> Senator Mathias. You got your answer. [Laughter.]
>
> Mr. Post. Well, Pete and I have found it humanly impossible to write every piece of music for every show. So we currently have a staff of six newcomers to fill in some of the blanks.
>
> Before us, composers that filled in blanks were called ghosts, they were invisible.
>
> Our staff not only shares in the cue sheet credit, in other words, participating in the BMI-ASCAP or SESAC royalties, but we pay them part of our fee that we get from the producers for composing the music. And, in addition, the producers are made very well aware of who writes what, when, and how.
>
> I am proud of that. That is something that I have been able to do for my business, starting as a newcomer.

I am just as proud today that my staff is recorded by BMI, and paid through BMI, for their work on the music we produce. I cannot say for certain how commonly composers like myself have staff help, or whether others credit them as I do, but I do know that people keep coming up from the street through the ranks as I did, and as I am trying to help my colleagues do it. As I said last year, before me, staff composers who filled in the blanks were called ghosts, and they were invisible. That is certainly untrue today, and I am proud of what I have done to change the situation.

ascap
American Society of Composers, Authors & Publishers

Bernard Korman
GENERAL COUNSEL

(212) 870-7510

December 22, 1987

FEDERAL EXPRESS

Hon. Dennis DeConcini
Chairman
Subcommittee on Patents, Copyrights
and Trademarks
Judiciary Committee
United States Senate
328 Senate House Office Building
Washington, D. C. 20510-0301

Re: S. 698

Dear Mr. Chairman:

Attached are ASCAP's answers to questions posed by you and Senators Grassley, Leahy and Thurmond.

Also attached is a copy of the letter dated February 27, 1987, from the All-Industry Television Station Music License Committee to television stations, referred to by Hal David at page 103 of the transcript of the hearing held on November 10, 1987. Mr. David pointed out that the broadcasters had referred to Magistrate Dolinger's interim fee decision as "a landmark decision for our industry," a statement Mr. Arries challenged. You will find that statement at the bottom of page 1 of the letter signed by Mr. Arries as Chairman of the All-Industry Committee.

Rather than burden the record with an additional lengthy statement pointing out in detail the many reasons that S. 698 is unsound, I respectfully request that the ASCAP statement submitted in opposition to last year's source license legislation, S. 1980, be incorporated by reference in the record of the hearing on S. 698. Our prepared statement begins at page 257 of the 1986 Hearing on S. 1980. We see no significant difference beween S. 1980 and S. 698.

Thank you for the courtesy extended to us and to all of the witnesses at the hearing on November 10th.

Respectfully yours,

Bernard Korman

Bernard Korman

BK:h
Enclosures

ASCAP'S ANSWERS TO QUESTIONS POSED BY CHAIRMAN DeCONCINI

Q. The broadcasters have accused the performance rights societies of being unreasonable in negotiations. Have the performance rights societies taken any action to discourage television syndicators from negotiating source license or per program agreements with broadcasters?

A. No. Television syndicators and broadcasters are free to negotiate licenses in any way they wish and there is nothing that ASCAP has done to discourage television syndicators from negotiating licenses of any kind with broadcasters. As to the accusation that we have been unreasonable in negotiations, we think our track record speaks for itself: in numerous proceedings since 1950, we have always reached agreements with our licensees and the Court has never had to determine reasonable fees after trial.

Q. Have the performance rights societies taken any action to discourage its members from entering into source license or per program agreements with movie studios or television stations?

A. No, and ASCAP may not lawfully do so. Under the Amended Final Judgment in United States v. ASCAP, ASCAP is enjoined from "Limiting, restricting, or interfering with the right of any member to issue to a user non-exclusive licenses for rights of public performance."

Q. If an individual composer were able to get a good agreement with a movie studio for a source license, how would that affect the blanket license paid by a broadcaster who acquired the programming that was source licensed? Could the broadcaster subtract the amount paid for the performance right to the music in the program from his blanket license payment?

A. Not under the terms of any of the blanket license agreements they have negotiated with us since 1949 and we do not see how any station would be advantaged by the suggested arrangement. Assume a blanket license fee of $100, and that a studio had paid $10 to a composer. The stations have said they would expect that cost to be passed on to them. If the station deducted the $10 from the blanket fee, it would still be paying a total of $100. This kind of arrangement would not save the station money, but it would vastly complicate the present blanket license arangement. The station would have to report its payment of an additional amount to the studio for music and ASCAP would have to verify the claimed deduction, all to no apparent purpose. Unless, of course, the stations don't expect to pay the studios for the additional cost of the source licenses.

The stations and we have always recognized that a deduction for source licensed programs would be appropriate for a per program license, but not for a blanket license. Indeed, the broadcasters' own economic expert witness testified at the trial of the Buffalo Broadcasting case that a deduction or "carve out" for source licensed programs would simply convert the blanket license into a per program license at a much lower fee.

Q. It seems to me that the broadcasters' biggest objection to the present blanket license system is that they have to pay for music publishing services they do not use, and for what they consider to be the exorbitant administrative costs of the performance rights societies.

Isn't it true that the payment of the blanket license amount to the performance rights societies is higher than the actual costs to the performance rights societies of administering the blanket license? In other words, doesn't the television music blanket license subsidize other activities of the performance rights societies? Wouldn't it be fairer if the television blanket license payment to the performance rights societies more accurately reflected the services attributable to television music?

A. It is true that the blanket license fee is higher than the cost of administering that license. If that were not so, ASCAP would lose money on each license it issued. The fact that must be kept in mind is that the fees paid are reasonable fees and reflect the value of the rights granted. How they are shared by writers and publishers is no legitimate concern of the broadcasters, any more than we can legitimately ask what they do with their profits.

The broadcasters' objection addressed to ASCAP's administrative costs is a make-weight argument designed to obscure the fact that the license fees they have been paying for years are fees they carefully negotiated and asked a federal judge to approve as reasonable and non-discriminatory. The fact is that ASCAP's cost of doing business is not high when one considers the necessary costs involved in running a large clearing house.

Q. Testimony introduced in the Buffalo Broadcasting case indicated that in 1979, 12 of the top 15 television music publishers were subsidiaries of 8 movie studios. At the hearing your panel agreed to furnish the Committee updated figures on how many of the top fifteen music publishers currently receive money from the television blanket license are affiliated with movie producers.

A. Nine in 1986. Three others in the top fifteen were affiliated with CBS. The nine received 9.7% of ASCAP's distribution to its members for local television performances in survey year 1986.

Q. One of the biggest complaints that broadcasters have about the blanket license is the payment of the music publisher's fee to the movie studios whom they are already negotiating with for the programming. Surely, if the movie studio is the publisher, it could acquire the performance right for the music in the programming.

Would you object to a provision that would require source licensing only of the publisher's interest where that publisher was owned by the producer? Wouldn't such a provision assure the composer of the same amount of compensation that they are now receiving?

A. Yes, to the first question; No, to the second. If the publishers granted licenses for stations at the source, the stations would not then need any other license and composers would not then receive the compensation they now receive. Stations simply would not continue to pay ASCAP if publishers were compelled to license them at the source. That "compromise" would be a total victory for the stations.

The agreements authorizing producers to include music in their programs now take into account the existing arrangements publishers and composers have with one another and with ASCAP. The agreements take many forms. The proposed "compromise" would wreak havoc with the existing arrangements and deprive parties of their bargains.

Q. What services do the television stations themselves receive from the movie publishing companies?

What services do the television stations receive from the performance rights societies?

A. The movie publishing companies furnish services that have been described in prior statements and testimony. See the statements of the National Music Publishers Association at 619-31 and of Jack Valenti at 560-62 of the 1986 Hearings before this Sub-Committee on S. 1980. The movie publishing companies perform the same role as other music publishers in helping composers and songwriters exploit their works. Publishers nurture and counsel newcomers; they promote or "plug" their works; they are the business affairs managers for writers; and they license and protect copyrights.

The movie publishing companies, like other publishers, also serve the stations simply by being part of an efficient clearing house system. All members, writers and publishers, serve the stations (and all other bulk music users) by enabling them to obtain access to a vast repertory at no transaction cost per performance, with no record keeping cost as to music use, and at a price guaranteed to be reasonable. Through ASCAP, members provide a very valuable service to the stations by making their music automatically available the instant it is created.

ASCAP's services are in granting television stations the right to perform copyrighted music in our repertory in all of their programs at a reasonable fee. By dealing with ASCAP, stations save the time, trouble and money that would be involved if they had to seek out copyright owners and deal directly with them. They have, from the beginning, recognized that blanket licenses are the cheapest and easiest way for them to obtain the performing rights they need. Contracts involving hundreds of millions of dollars have been made on the understanding that music would be licensed as it has been licensed. Despite the vehemence of their present protestations, the broadcasters have been well served by the present fair and efficient system that they built jointly with us.

ASCAP'S ANSWERS TO QUESTIONS POSED BY SENATOR CHUCK GRASSLEY

Q. How many members of ASCAP and BMI in Iowa have received over $50 from these performing rights organizations for the music included in syndicated television programs and commercials during the last year?

A. ASCAP does not maintain records in a form that would permit us to give a numerical answer to this question without incurring significant costs. It is safe to assume that the number is not nearly so large as the number of citizens of Iowa who care about composers and love music. Meredith Willson hailed from "River City", also known as Mason City, Iowa. Iowans, like other Americans, enjoy "The Music Man" when it is shown on television, and his widow, the successor to his ASCAP membership, now receives his royalties.

ASCAP does not pay its members separately for performances of music in syndicated television programs and commercials. We pay for all surveyed local television station performances in all local television programs and commercials without regard to whether they are syndicated or locally-originated.

Television stations pay license fees for the right to perform copyrighted compositions in the ASCAP repertory on all their local (as distinguished from network) programs and commercials. Our system of paying royalties is, of necessity, a complex system involving masses of data and many distinctions among types of performances -- feature, theme, background, etc. None of these distinctions is related to whether a performance occurs on a local program that is a syndicated program or on any other kind of local program.

To give a numerical answer to this question, we would have to go back to raw data and create a new set of records to show a new compilation of earnings. The cost would be substantial and, if extended to other states, would be enormous.

Q. Since blanket performance licenses originated when only "live" performances were possible, aren't they inappropriate for the contemporary television industry due to the fact that today's programming is taped in advance and thus it is capable for all parties to negotiate for all the rights contained in a given program all at once?

A. The question is based on a misconception that may arise from the fact that, in the early days, network programs were mostly "live". There was never a time when "only live performances were possible" for local stations. The fact is that the majority of local (non-network) programs were films when the first blanket licenses were negotiated with an All-Industry Committee.

The first blanket licenses were negotiated when local stations were showing old movies. They preferred the blanket license to any other way of clearing the music rights in those films, as well as in their other local programs and announcements.

It is certainly possible for all the parties to negotiate for all the rights in a given program at one time. However, that is not what the parties negotiated repeatedly, in 1949, 1953, 1957 and 1969. Contracts involving hundreds of millions of dollars have been made over many years on the understanding, shared by all concerned, that music rights would continue to be licensed as they have always been licensed.

At hearings on S.1980 last year, Senator Mathias and Mr. Jack Valenti discussed the enormous problems that would be created by source licensing legislation. They used the film

"Casablanca" as an example. That film included standards written by eleven different composers. Senator Mathias inquired as to how the estate of one of those composers, the late Herman Hupfeld, would be compensated for his great song "As Time Goes By" when performed by television broadcasts of "Casablanca". The record last year was very clear that source licensing legislation would create a nightmare. (See Hearing on S. 1980, at 582-84.)

Q. Aren't the large television production corporations the real beneficiaries of the blanket license system -- because composers are hired by a particular studio to write the music for a television show, while the studio maintains the rights to the music?

A. No, the beneficiaries of the blanket license system are the public, which views programs containing the music the producers think most enhances their programs, the users and the creators, all of whom benefit from the present efficient system.

The studios do not maintain the rights to the music. Under longstanding industry practice, the performing rights in works written for programs on a "for hire" basis are assigned by the studios back to the composers and to music publishers, some of which are owned by composers. Many works used in television programs are pre-existing works owned by publishers who have no connection with studios.

It must be remembered that the large risk-takers in this industry are the television program producers. Only 3% of the programs produced ever get into syndication. Most of the others lose money. Despite this enormously risky business, producers are able, under the blanket license system, to select the music they think best for their programs at no cost in terms of the public performance rights and at very little total cost. They, after all, do not perform the music; the stations do. Composers are risk-takers with the producers. Composers write the music for television programs for very little money "up front" (to use the industry phrase). If the program succeeds and does get into syndication, the producer and the composer earn reasonable rewards. If the program fails, there are no rewards -- only the music used in successful programs earns money.

Q. Aren't the rights fees collected by ASCAP paid to the company that publishes the music for the program -- which is usually a subsidiary of the television production company -- and which in turn gives a portion of the fee to the composer?

A. No. ASCAP pays the composer directly, not through the publisher. ASCAP's domestic royalty distributions are made to the owners of the music which appears in the Society's survey of performances, half to the publishers as a group and half to the writers as a group. The publishers can never get any part of the writers' royalties, but the writers can and often do receive part or all of the publishers' royalties.

Q. Would you explain the difference between how a local television station is treated and how a movie theater is treated when a music performance is licensed?

A. Local television stations have always obtained ASCAP licenses from the time they went on the air granting them the right to perform the copyrighted works in the ASCAP repertory on all of their local programs, including film programs. These licenses have been negotiated on an industry-wide basis pursuant to longstanding industry practice.

Movie theatres are treated differently for reasons that were never applicable to television. The ASCAP of the 1940's was a very different organization than it has been since 1950. The pre-1950 ASCAP was found to be in violation of the antitrust laws in its method of licensing motion picture theatres. The relief granted to the theater owners in the 1948 Alden-Rochelle case was source licensing.

ASCAP never committed any antitrust violation against television broadcasters. Ever since 1949, when the first fee-bearing licenses were negotiated -- free ASCAP licenses were issued from 1941 through 1948 -- the broadcasters repeatedly negotiated ASCAP blanket licenses for the music in all their programs, including the music in films.

Entirely different market mechanisms have grown up over the last 40 years in the television and movie markets. When films are licensed to theaters, producers receive a percentage of the box office, often a very high percentage. The arrangements differ in television where the stations are in the dominant position. There are only a few stations in each market, and a vast number of programs available from many sellers to fill only a few hours. According to Mr. Jack Valenti's testimony last year, there are 20,000-30,000 films and 4,000-5,000 television shows, all with music, available to fill those few hours (Hearing on S.1980 at 583.)

Movie source licensing in the United States is an anomaly resulting not from any copyright principle or policy, but from the old antitrust decision. It causes injury to creators who often must sell their music to producers for a pittance. It should be noted that in foreign countries, local performing rights societies do license theaters and, ironically and anomalously, American composers are paid for performances in foreign theaters where American films are in great demand.

Q. Wouldn't a system of source licensing for the performance rights of music contained in syndicated television programming affect only a small number of composers, since only a small number now receive compensation for such programming?

A. No. Thousands of composers receive some money from local television performances. As previously stated, our records are not set up to enable us to identify, without incurring substantial cost, those whose works are performed only in syndicated programs. No doubt the large majority of composers who receive any royalties based on local television performances are paid for peformances in syndicated programs.

For our fiscal survey year 1986, the last year for which we have complete data, ASCAP credited approximately 5,900 writers for local television performances. (Of these, about 4100 were ASCAP members and about 1800 were members of affiliated foreign societies.) It is important to know that this number varies and that it is a changing group. As Hal

David testified, ASCAP's doors are open to all writers, and the result is that many members are neither full-time professionals nor active in the field of television. The record also shows that Mike Post, a very successful composer of music for television programs in recent years, was unknown not too many years ago.

Finally, if S.698 were enacted, we can be sure other users would seek the same result and there would be danger of a domino effect that would injure an even larger group of composers and songwriters.

Q. Because broadcasters contend that they have asked the studios for source licenses for the music in their syndicated television programs while alleging that the studios have refused to bargain seriously over this issue, haven't the only concessions achieved by the broadcasters been based upon the pressure of lawsuits against ASCAP and BMI?

A. No. First, the record on the Buffalo Broadcasting case was clear that it was the broadcasters, not the studios, that refused to bargain seriously for source licenses.

Second, ASCAP has always regarded the broadcasters as its most important customers and has tried to meet their reasonable demands. Our success in achieving that result was reflected in the last negotiated agreement -- the so-called Shenandoah agreement -- which was a radical departure from the prior negotiated agreements. The Shenandoah agreement reduced the effective fee by nearly 50%, and also recognized the broadcasters' reasonable requests for adjustments in the license fee formula.

The Shenandoah agreement was hammered out, line by line, over a period of many months. The broadcasters considered that agreement a good one at the time, and asked the Court to approve it as reasonable and non-discriminatory. The All-Industry Committee that negotiated the Shenandoah Agreement was eventually replaced by a new All-Industry Committee which brought its unsuccessful antitrust action and now seeks legislation to change the entire system.

In this connection, it is interesting to recall that in 1973 each station had the choice of letting its agreement expire that year or extending it through 1977. Nearly every station followed the recommendation of Les Arries, then as now the All-Industry Committee Chairman, that the agreements should not be terminated but should be allowed to run through 1977.

Q. Isn't it correct that this bill does not affect the use of music in radio, restaurants, concert halls, and television network programming?

A. Only in the sense that the bill applies literally only to local television stations. If enacted, it is very likely that other users would try for the same goal, particularly the television networks. And the effect internationally would, we think, be truly disastrous because so many world-wide transactions have been made on the basis that the present system would continue. Retaliation against American music -- one of our best exports -- is the predictable result of enactment of S.698. Indeed, the European Economic Community went on record with this Committee last year in opposition to S.1980 and source licensing.

Q. What, if any, effect will the enactment of S. 698 have upon the operation of the performing rights societies?

A. Enactment of S.698 would significantly injure ASCAP by injuring the members of ASCAP. ASCAP is an unincorporated association with no other interest than to serve as a clearing house through which its members can license their rights, users can obtain licenses efficiently, and music can be brought to the public lawfully, as the Copyright Act intends. The effect of S. 698 would be to shift the responsibility that the law now imposes on the broadcasters who perform music to the risk-taking producers who record, but do not perform music. These producers are not in the same economic position as the broadcasters. The stations are the only game in town for program sellers and the only game in town for sponsors. We have referred, in our answer to the previous question, to the likely injury abroad.

The only fair way to judge the effect of S. 698 is to consider the impact it would have on the market place where, until now, broadcasters have paid reasonable license fees and composers and publishers have been rewarded by continuing royalties for the continuing performance of their works. S. 698 would change the market into one in which composers and publishers would be compelled to abandon the royalty system in favor of the one time payment, or "buy-out" system. And, of course, the price at the time of the buy-out would have to be set before the value of the music or the success of the program was known.

ASCAP'S ANSWERS TO QUESTIONS POSED BY SENATOR PATRICK LEAHY

Q. The broadcasters argue that under current copyright law, millions of dollars end up in the pockets of Hollywood studios and ASCAP instead of the composers, and that 20 percent of your operation goes to overhead. How do you respond to these charges?

A. There are a number of ways of responding, each stressing different aspects. For example, one way to begin is by stating the obvious: S.698 does not address the question of how performing rights royalties are divided by ASCAP between the composers and the publishers. Instead, it contemplates that fees will be paid to the composers and the publishers by producers and syndicators. Under S.698, the composer will no longer be assured of receiving at least 50%; he will no longer have a voice in the organization distributing royalties; and, where the program producer distributing the fee owns the music publisher (the situation most cited by the broadcasters), it is difficult to see how the composer can be as well protected as he is today or how the percentage paid to those publishing subsidiaries will be reduced. The broadcasters have made clear their expectation that they will pay less for music under S.698 leaving it to the production company to decide who gets cut back -- its publishing subsidiaries or the composer. It is not hard to guess who will take the blow.

S.698 does nothing to impair the power of producers to collect music performance fees through their publishing subsidiaries. It does, however, weaken the position of the composer. S.698 purports to assure composers of some kind of continuing payment but, in reality, its promise is hollow for it provides no mechanism to assure any payment, much less any reasonable payment.

ASCAP is an unincorporated membership association which is owned and operated jointly by writers and publishers. The arrangement among them calls for domestic royalties to be divided one-half to writers and one-half to publishers. While writers may receive any part or all of the publisher's share, publishers cannot receive any part of the writer's share. These arrangements recognize the contributions made by both classes of member. Contrary to the impression the broadcasters seek to create -- that virtually all music in television is written specifically for a television program -- there are many pre-existing compositions used in syndicated programs, frequently well-known standards.

Even music written specifically for a television program, unlike any other ingredient in that television program, may have, and often does have, a separate life apart from the program. There is no reason why publishers who successfully promote such music should not be rewarded. The broadcasters' real complaint is not that studios benefit but that they pay too much for music. The present system assures that they will never pay more than a reasonable fee. How writers and publishers choose to apportion the proceeds of the reasonable fees ASCAP collects is not a legitimate concern of the broadcasters any more than ASCAP can legitimately be concerned with the salaries the broadcasters pay themselves and their family members, or what they do with their profits.

Turning to the second part of your question, the administrative expenses that ASCAP must incur include the cost of surveying performances all over the country; the cost of amassing and analyzing data concerning the interest of domestic and foreign writers and publishers in a vast number of musical works; the cost of locating and licensing music users of every kind and description in every corner of the nation; the cost of bringing lawsuits for copyright infringement against pirates; the cost of defending antitrust lawsuits such as the Buffalo Broadcasting case; the cost of engaging in an informational campaign in Congress to meet the broadcasters' extensive efforts to change the copyright law to the detriment of our members; and the cost of dealing with foreign performing rights societies all over the world.

These costs are all necessary. They are incurred under budgets approved by a Board of Directors elected by writers and publishers. In 1987, the overhead will be in the order of 15-16%, not 20%.

Q. What distinguishes the licensing of performance rights for syndicated television programming from that of theatrical distribution or motion pictures? Why should there be different licensing schemes?

A. Local television stations have always obtained ASCAP licenses from the time they went on the air granting them the right to perform the copyrighted works in the ASCAP repertory on all of their local programs, including film programs. These licenses have been negotiated on an industry-wide basis pursuant to longstanding industry practice.

Movie theaters are treated differently for reasons that were never applicable to television. The ASCAP of the 1940's was a very different organization than it has been since 1950. The pre-1950 ASCAP was found to be in violation of the antitrust laws in its method of licensing motion picture theaters. The relief granted to the theater owners in the 1948 Alden-Rochelle case was source licensing.

ASCAP never committed any antitrust violation against television broadcasters. Ever since 1949, when the first fee-bearing licenses were negotiated -- free ASCAP licenses were issued from 1941 through 1948 -- the broadcasters repeatedly negotiated ASCAP blanket licenses for the music in all their programs, including the music in films.

Entirely different market mechanisms have grown up over the last 40 years in the television and movie markets. When films are licensed to theaters, producers receive a percentage of the box office, often a very high percentage. The arrangements differ in television where the stations are in the dominant position. There are only a few stations in each market, and a vast number of programs available from many sellers to fill only a few hours. According to Mr. Jack Valenti's testimony last year, there are 20,000-30,000 films and 4,000-5,000 television shows, all with music, available to fill those few hours (Hearing on S.1980 at 583.

Movie source licensing in the United States is an anomaly resulting not from any copyright principle or policy, but from the old antitrust decision. It causes injury to creators who often must sell their music to producers for a pittance. It should be noted that in foreign countries, local performing rights societies do license theaters and, ironically and anomalously, American composers are paid for performances in foreign theaters where American films are in great demand.

There should be only one method of licensing -- the television method, which permits market choice. The movie theater method is unfair -- it eliminates market choice and punishes today's writers for the errors of past generations.

Q. I've heard that people ask if broadcasters want source licensing so much, why haven't they tried to secure it in the free market. But why would broadcasters seek source licensing if they have to purchase a blanket license anyway and the blanket license will cover any music licensed at the source?

A. Broadcasters are not compelled to take blanket licenses -- they have always taken them because they found the blanket license system to be the cheapest and most sensible route for them. At any time since television became commercially viable in the 1940's, the broadcasters could have obtained per program licenses and used a combination of per program and source licensing to save money. It has never been worth their while to pursue that course because the blanket license arrangements they have successfully negotiated were always, at least until now, considered preferable by them to the risks involved in seeking Court determination of reasonable license fees.

The present All-Industry Committee, which is seeking enactment of S. 698, is simultaneously litigating the question of the reasonableness of the blanket and per program fees quoted by ASCAP. Any broadcaster who wishes to select the programs he broadcasts on the basis of the music content, and whether he is able to negotiate satisfactory source or direct licenses, may well be able to save money by taking the per program license rather than the blanket license. Indeed, many stations are now considering that option in the pending Court proceedings by virtue of an interim fee decision which they regard as a "landmark" decision for their industry.

Q. Do your blanket licensing agreements provide for any reduction in the fee if broadcasters have gone to the trouble of securing some source licensing for the material being used? If not, why not?

A. No, because none of the terms of any of the broadcasting licenses negotiated with many All-Industry Committees has ever provided for any such reduction, and we do not see how any station would be advantaged by the suggested arrangement. Assume a blanket license fee of $100, and that a studio had paid $10 to a composer. The stations have said they would expect that cost to be passed on to them. If the station deducted the $10 from the blanket fee, it would still be paying a total of $100. This kind of arrangement would not save the station money, but it would vastly complicate the present blanket license agreement. The station would have to report its payment of an additional amount to the studio for music and ASCAP would have to verify the claimed deduction, all to no apparent purpose. Unless, of course, the stations don't expect to pay the studios for the additional cost of the source licenses.

The stations and we have always recognized that a deduction for source licensed programs would be appropriate for a per program license, but not for a blanket license. In fact, the broadcasters' own economic expert witness testified at the trial of the Buffalo Broadcasting case that a deduction or "carve-out" for source licensed programs would simply convert the blanket license into a per program license at a much lower fee.

Q. What market place alternatives are available to the broadcasters that they have not used?

A. Until now, the broadcasters have not used the per program license (except very rarely), the source license or the direct license, each of which -- alone or in combination with one another -- has been freely available since at least 1950.

ASCAP's Answers To Questions from Senator Strom Thurmond

1. Following last year's hearing, in response to a written question which I submitted, you replied

> "Approximately 82 cents of every dollar collected by ASCAP is distributed to writers, publishers and to foreign societies. The remainder representing administrative costs, goes mainly to the expense involved in monitoring performances...and in collecting fees."

Could you explain why the royalties paid to screenwriters and directors can be administered for a 4% administrative charge as opposed to the nearly 20% charged by ASCAP to administer its royalty system?

Answer: Residuals paid by disbursing agents of unions of screenwriters and directors can be administered cheaply because what they do amounts to an automated payroll system. Indeed, based on ASCAP's experience, we think we could administer that kind of system for less than 4%. The disbursing agent does not have anything like ASCAP's mission.

The administrative costs that ASCAP must incur are of an entirely different order of magnitude than the costs of a union's disbursing agent. The question as stated above, omits some of the costs we mentioned in answer to last year's question, namely, the costs of "license compliance", "distributing royalties", and "licensing users."

Specifically, ASCAP's administrative expenses include the cost of surveying performances all over the country; the cost of amassing and analyzing data concerning the interest of domestic and foreign writers and publishers in a vast number of musical works; the cost of locating and licensing music users of every kind and description in every corner of the nation; the cost of bringing lawsuits for copyright infringement against pirates; the cost of defending antitrust lawsuits such as the Buffalo Broadcasting case; the cost of engaging in an informational campaign in Congress to meet the broadcasters' extensive efforts to change the copyright law to the detriment of our members; and the cost of dealing with foreign performing rights societies all over the world.

2. Of the money remaining after administrative expenses, half is paid to publishers and half to composers.

Testimony introduced at trial in the Buffalo Broadcasting case, produced the only published information on ASCAP's distribution system. This revealed that in 1979 twelve of the top 15 ASCAP television publishers were identified as subsidiaries of eight (Hollywood) producers. Could you identify for the Committee how many of the top 15 ASCAP television publishers currently are affiliates of producers and identify those producers?

Answer: Of the top 15 publishers in terms of earnings from local television performances, 9 were affiliated with Hollywood producers and 3 with CBS. The 9 affiliated publishers and producers involved were as follows: Addax Music (Paramount), Famous Music (Paramount), Golden Torch (Columbia Pictures), Harms, Inc. (Warners), Leeds Music (MCA), MCA Music (MCA), Twentieth Century Fox Music (Twentieth Century Fox), WB Music (Warners), M. Witmark & Sons (Warners). These 9 publishers earned 9.7% of ASCAP's distributions to its members for local television performances in survey year 1986.

3. In a written response to a question that I submitted last year you stated:

> "S.1980 (the predecessor to S. 698) does nothing to impair the power of producers to collect music performance fees through their publishing subsidiaries. It does, however, weaken the position of the composer."

Broadcasters have complained that only 40 cents on each dollar they pay goes to the actual author of the music. Their strongest objection is to paying the publishing fee, through ASCAP, to the Hollywood producer.

Since you acknowledge that producers who own publishing rights could be paid--even under "source" licensing--by direct negotiation with the broadcaster, what would be wrong with amending S.698 to provide for source licensing only of the publisher's interest where that publisher was owned by the producer? Isn't this a possible compromise which would assure composers of receiving every cent they now receive, exactly as they now receive it -- through you -- while responding to broadcaster pleas for the ability to negotiate directly with studios which sell them shows in cases where those studies actually own music copyrights?

Answer: If the publishers granted licenses for stations at the source, the stations would not then need any other license and composers would not then receive the compensation they now receive. Stations simply would not continue to pay ASCAP if publishers were compelled to license them at the source. That "compromise" would be a total victory for the stations.

The agreements authorizing producers to include music in their programs now take into account the existing arrangements publishers and composers have with one another and with ASCAP. The agreements take many forms. The proposed"compromise" would wreak havoc with the existing arrangements and deprive parties of their bargains.

4. Please identify the Hollywood studios which are represented on your governing board through affiliated or subsidiary music publishing companies.

Answer: There are three Hollywood studios represented on the ASCAP Board of Directors through affiliated or subsidiary music publishing companies, MCA, which owns a major New York City television station, Paramount and Warner Brothers. The other twenty-one members of the ASCAP Board of Directors (12 writers and 9 other publishers) are not affiliated with any Hollywood studio. The writer directors of the ASCAP Board are elected by their fellow writer members and the publisher directors are elected by their fellow publisher members.

It is interesting to note that BMI, which has also been strongly opposed to S. 698, has a Board of Directors consisting of twelve broadcasters and one officer-employee, the President. That Board is elected by some 500 owners of BMI stock, all of whom are broadcasters.

5. Since ASCAP represents through publishing companies a sizeable number of large corporations, how can you present yourselves as primarily a composers' organization?

Answer: ASCAP does not represent itself "as primarily a composers' organization." We have about 27,000 writer and about 10,000 publisher members. We represent ourselves as an unincorporated membership association comprised of composers, authors and publishers of musical compositions. Contrary to the broadcasters' suggestion, we are proud, not embarrassed, by the presence of music publishers who are affiliated with major corporations. Indeed, broadcasters have owned some of our most successful publishers.

ALL-INDUSTRY TELEVISION STATION
MUSIC LICENSE COMMITTEE
24 East 51st Street
New York, N.Y. 10022

February 27, 1987

Re: ASCAP Rate Court Interim Ruling

Dear Television Broadcaster:

As you are aware, our industry, through this Committee, has been involved in an ongoing federal court rate proceeding against ASCAP to obtain reasonable music license fees. This letter is to advise you of the court's most recent "interim" fee decision, rendered on February 17th.

The issue decided by the court was the proper level of interim blanket and per program fees for the period commencing April 1, 1985, to continue through 1986 and 1987 and possibly beyond pending a court determination of final fees for our industry. Such interim fees will be retroactively adjustable at the time a final fee is determined.

ASCAP pressed the court to continue for interim fee purposes the outdated percentage-of-revenue "Shenandoah" formula negotiated 19 years ago. If applied to projected industry revenues in 1986, it is estimated that the Shenandoah formula would yield to ASCAP some $70 million in fees from the local television industry for that year alone.

We argued to the court that the Shenandoah formula was an unjustifiable one to carry forward, even for retroactively adjustable interim fees, because it would result in ever-spiraling music license fees tied to station revenues. We instead suggested that an industry-wide interim blanket license fee be set at a fixed amount approximating that paid by the television networks. We also requested the court to compel ASCAP to provide all local television stations with a meaningful per program license which might permit stations that have been successful in licensing a good deal of their music needs for non-network programming from sources other than ASCAP to achieve a savings (even at the interim fee stage) in music license fees as compared to the ASCAP blanket license.

Last week, Magistrate Michael Dolinger issued a 39-page interim fee ruling which we believe will prove to be a landmark decision for our industry.

Blanket License Ruling: The court rejected ASCAP's argument that it was entitled to a continuation of the Shenandoah percentage-of-revenue formula. In a decision that we believe will have profound long term benefit for our industry, the court concluded that a revenue-based license formula is not an appropriate measure of the value of music performing rights to local television broadcasters. It instead adopted our suggestion to set a fixed, industry-wide fee, though it declined our invitation to set the level of that fee at the level paid by the three networks. In what the Court conceded was an "arbitrary" measure between the respective levels advanced by ASCAP and the broadcasters, the Court established an industry-wide annual interim fee of $60 million, retroactively payable to April 1985 (this means $45 million for that year) and on an ongoing basis until a final fee is determined. To provide some measure of the savings achieved from ASCAP's license proposal, such a fee represents a reduction of the magnitude of some $10 million below estimated Shenandoah levels for 1986 alone. While we had hoped to do better even at the interim fee stage, we now have a solid framework for seeking final fee levels independent of the Shenandoah formula that would represent an even greater reduction.

Per Program Ruling: Perhaps even more significantly in terms of long term impact, the court adopted our arguments regarding the need for a meaningful per program license alternative, and held that ASCAP must offer stations a per program license that "would be more economical than a blanket license" for those stations which do not use ASCAP music for considerable amounts of their non-network programming. By means of this ruling, stations finally have available a structure from which they can work to reduce their total music costs.

Effect of the Interim Fee Decision

Certain implications of the Court's interim fee ruling are somewhat unclear and will require clarification by the Court. For example, details as to the implementation of a per program license form that can afford stations actual license fee savings at the interim fee stage must still be worked out. In addition, each station's blanket license fee in relation to the aggregate $60 million fee also remains to be determined.

It is apparent that for virtually all of those stations that have been paying at the "frozen" 1980 rate since April 1, 1985, this interim blanket license fee will be higher than the "frozen" 1980 level payments. For these stations, an interim fee adjustment retroactive to April 1, 1985 will be due to ASCAP in the coming months.

For those stations that have been paying at Shenandoah levels since April 1, 1985, i.e., most stations which came on the air since February 1, 1983, an adjustment in their favor retroactive to that date should be forthcoming.

Please note that these adjustments are interim only, subject again to retroactive adjustment once a final fee is set. Additionally, we should point out that the court has not as of this time adopted ASCAP's request to make this interim fee ruling retroactive to the period February 1, 1983 through November 15, 1984.

BMI

You should also note that this decision will result in adjustments to your station's BMI payments as well. This, you will recall, is the result of our agreement with BMI which ties BMI's interim and final license fees to those paid to ASCAP.

Details to Follow

We will be in touch with you shortly regarding the necessary adjustments in both your ASCAP and BMI license fee payments, developments on the per program license front and other matters pertaining to the details of your future license relationships with ASCAP and BMI. In the meanwhile, please do not change your current payments to either ASCAP or BMI until you have been advised by our Committee to do so.

Other Matters

You will be receiving soon, under separate cover, a letter describing each station's obligation to produce certain limited categories of documents and data for purposes of the rate court litigation. As you will see in those materials, we have gone to great pains to ensure the confidentiality of all documents and data which the court has required to be produced. While we recognize the inconvenience which document and data production can cause, we believe it is in each station's interest to cooperate and respond promptly so that we can move forward to a final fee resolution in the rate court. Certain data -- ASCAP reports for the years 1985 and 1986 -- also will assist in computing the new interim fees payable to ASCAP and BMI.

We also want to inform you that there will be a panel discussion covering ASCAP/BMI matters at the upcoming NAB convention. The panel is scheduled for Tuesday morning, March 31, at 9 a.m. Please join us for this important session.

Sincerely,

Leslie G. Arries, Jr., Chairman

BMI Responses To Questions From Senator Grassley

1. HOW MANY MEMBERS OF ASCAP AND BMI IN IOWA HAVE RECEIVED OVER $50 FROM THESE PERFORMING RIGHTS ORGANIZATIONS FOR THE MUSIC INCLUDED IN SYNDICATED TELEVISION PROGRAMS AND COMMERCIALS DURING THE LAST YEAR?

A similar question was asked of us by letter from your office in May of this year. In a response that is still applicable, BMI President and Chief Executive Officer, Frances W. Preston, wrote, in part:

> "According to our records, approximately 225 Iowans - some of whom likely earn royalties from television performance of their music - are currently members of the BMI family. Unfortunately, we cannot tell exactly how many fall within this category because our records do not necessarily reflect permanent home addresses. A number of active West Coast composers, for example, actually maintain a permanent voting residency elsewhere."
>
> Insofar as the additional detail requested - names, addresses and royalty earnings data - I hope you understand, but we consider that information to be confidential. It has always been our policy not to voluntarily release such detail to third parties without the express permission of those involved."

As an incidental matter, however, the broadcasters have repeatedly testified that one of the advantages of S. 698 is that it would give them incentive to hire local composers. In point of fact, though , a court order following the lower court decision in the Buffalo Broadcasting case provided just that.

BMI Responses To Questions From Senator Grassley (continued)

For approximately a year and a half, broadcasters again had, in effect, a "carve out" provision. By "carve out", we mean that they had the right to deduct from their blanket license fee computations any fees paid for licenses obtained from sources other than the performing rights organizations.

During this time, therefore, TV broadcasters had one of the major items they have testified that S. 698 would give them. They were able to hire local composers and "carve out" - or deduct - monies paid to them from their BMI license fees.

We have no way of being certain, but, to the best of our knowledge, of the approximately 225 BMI affiliated composers in Iowa, the number who benefited was exactly none!

2. SINCE BLANKET PERFORMANCE LICENSES ORIGINATED WHEN ONLY "LIVE" PERFORMANCES WERE POSSIBLE, AREN'T THEY INAPPROPRIATE FOR THE CONTEMPORARY TELEVISION INDUSTRY DUE TO THE FACT THAT TODAY'S PROGRAMMING IS TAPED IN ADVANCE AND THUS IT IS CAPABLE FOR ALL PARTIES TO NEGOTIATE FOR ALL THE RIGHTS CONTAINED IN A GIVEN PROGRAM ALL AT ONCE?

Agreements between local television broadcasters and the performing rights organizations have always been the result of arms-length negotiations. The current BMI agreement was, in fact, the result of just such a negotiation and, at the time it was concluded, the television industry - through its negotiating committee - was publicly pleased with the result.

In an October 1985 letter signed by Leslie G. Arries, Chairman of the All Industry TV Music License Committee (who appeared before your subcommittee in that same capacity on November 10, 1987), and sent to all television broadcasters, the committee said:

BMI Responses To Questions From Senator Grassley (continued)

> "We are pleased to enclose copies of the new form of BMI-local television station blanket license agreement which is the result of many months of negotiations between BMI and the All-Industry Television Station Music License Committee.....We think it is a good agreement (emphasis added) and therefore strongly endorse it...."

Based on their own words, therefore, it seems that, as recently as two years ago, the television industry did not find the blanket license to be "inappropriate". In fact, at no time during all of the local TV negotiations that took place up until immediately prior to Buffalo case - and when programs were certainly being taped - did the broadcasters ever ask for any license type other than those that were currently available.

It should also be mentioned that this same question of "appropriateness" was examined by the courts in both the CBS and the Buffalo cases.[1] In both instances, the license form was found to be not inappropriate because other viable alternatives (direct, source and per-program licenses among them) existed.

As we have said before, however, we do not mean to imply that because the proponents once preferred this particular form of license they must now always have it. If the broadcasters have other suggestions, then they should be put where they belong - on a bargaining table.

---

[1] The CBS and Buffalo cases referred to in this document are as follows:

BMI v. CBS, 441 U.S. 1 (1979), on remand, CBS v. ASCAP, 620 F. 2d 930 (2d Cir. 1980), cert. denied, 450 U.S. 970 (1981) and Buffalo Broadcasting Co. v. ASCAP, 744 F.2d 915 (2d Cir. 1984), cert denied, 105 S. Ct. 1181 (1985).

BMI Responses To Questions From Senator Grassley (continued)

We cannot help but continue to wonder, however, why - if the present system is so obviously "unfair" - did the proponents consistently reject BMI's often repeated offer to submit differences to a panel of impartial arbitrators.

3. AREN'T THE LARGE TELEVISION PRODUCTION CORPORATIONS THE REAL BENEFICIARIES OF THE BLANKET LICENSE SYSTEM--BECAUSE COMPOSERS ARE HIRED BY A PARTICULAR STUDIO TO WRITE THE MUSIC FOR A TELEVISION SHOW, WHILE THE STUDIO MAINTAINS THE RIGHTS TO THE MUSIC?

Apparently a misunderstanding persists with regard to the system. It is true that some music - especially television theme music - is written by composers hired by the program producer. However, as Mike Post testified before you, these are not staff employees. Mr. Post, in fact, said that he knew of no one who worked in this apparently mythical "staff composer" position for some studio.

Very simply the composers who create television theme and background music are not employees in the conventional sense of the word. They are, instead, considered to be independent contractors and, as such, retain all of their performing rights.

It is a common, worldwide practice, however, for the composer - television or otherwise - to share his or her performing rights with a publisher. The general, worldwide rule is that the publisher's share cannot exceed 50% and, as you have already heard from testimony, it is sometimes considerably less.

BMI Responses To Questions From Senator Grassley (continued)

As to who the primary beneficiary of the blanket license system is, we believe it is the broadcasters. It is a method whereby they secure the legal right to use the property of others while expending a minimal amount of administrative effort in the process. Other license forms which do exist - and which the broadcasters have consistently chosen not to use - require a greater administrative expenditure on their part.

We believe a separate statement filed last year by the Motion Picture Association, but to be printed within this record, also addresses this question. As part of our response, therefore, we respectfully call your attention to that statement.

4. AREN'T THE RIGHTS FEES COLLECTED BY ASCAP AND BMI PAID TO THE COMPANY THAT PUBLISHES THE MUSIC FOR THE PROGRAM--WHICH IS USUALLY A SUBSIDIARY OF THE TELEVISION PRODUCTION COMPANY--AND WHICH IN TURN GIVES A PORTION OF THE FEE TO THE COMPOSER?

The simplest answer to the question is no. The composer's share, which cannot be less than 50%, of performance royalties is paid directly to that composer. The publisher does not act as an intermediary paymaster.

It must also be pointed out that most publishers are not affiliated with program producers or syndicators nor do most active syndicators have publishing subsidiaries. Within the same context, it should also be noted that a number of the publishers involved in TV background and theme music are subsidiaries of firms with major broadcast interests.

We respectfully call your attention to additional detail contained within our reply to Question #13 from Senator DeConcini.

BMI Responses To Questions From Senator Grassley (continued)

5. WOULD YOU EXPLAIN THE DIFFERENCE BETWEEN HOW A LOCAL TELEVISION STATION IS TREATED AND HOW A MOVIE THEATER IS TREATED WHEN A MUSIC PERFORMANCE IS LICENSED?

Under the law they are treated exactly the same because, as a matter of law, motion picture theaters are not exempted from the requirement of obtaining a performing rights license. The difference is a procedural one that exists only in the United States and is the outgrowth of marketplace economics that had their genesis in the late 1940's.

In 1948, ASCAP was judged to have violated the anti-trust laws with regard to their licensing of motion picture theaters. As a consequence, the ASCAP consent decree was amended and, in effect, a penalty was levied against their membership. ASCAP was prohibited from licensing motion picture theaters because, it was held, ASCAP's acquisition of exclusive licensing rights to public performance of music prevented motion picture exhibitors from obtaining direct licenses.

As the Appellate Court in the Buffalo case clearly noted, though, the situation no longer exists and both ASCAP and BMI are, today, granted only non-exclusive rights. It should also be pointed out, however, that, while the underlying problem has long since been cured, ASCAP members who were not even born at the time are still being penalized and the broadcasters are, in effect, suggesting the penalties be extended even further.

Under the system that evolved, theater owners, today, do receive performance rights with the can of film. It does not follow, however, that this can be considered an appropriate model for a TV syndication market revision. Quite to the contrary, it cannot. The differences between the two businesses are simply too fundamental. Film producers "rent" their films to motion picture theaters and, in exchange, take a percentage of the box office receipts. No similar relationship exists between program producers and television stations though, we suspect, the producers would be delighted if one did.

Moreover, insofar as composers are concerned, there is no question that those working on motion pictures receive more "up front" money than their TV brethren, but that amount is still surprisingly small. It is clearly understood, though, that the fee is merely one part of an overall compensation package that also includes anticipated performance royalties when (and if) the film plays on television anywhere in the world or when, anywhere in the world outside of the U.S., it is shown in a motion picture theater.

6. WOULDN'T A SYSTEM OF SOURCE LICENSING FOR THE PERFORMANCE RIGHTS OF MUSIC CONTAINED IN SYNDICATED TELEVISION PROGRAMMING AFFECT ONLY A SMALL NUMBER OF COMPOSERS, SINCE ONLY A SMALL NUMBER NOW RECEIVE COMPENSATION FOR SUCH PROGRAMMING?

As to just how many would be affected, the "minimal" numbers that have generally been circulated by the proponents of S. 698 are extremely deceptive. To begin with, they imply that the universe of composers benefiting from television theme and background work is a constant, unchanging universe. That is simply not true!

BMI Responses To Questions From Senator Grassley (continued)

Even if one were to assume - incorrectly - that the number of opportunities remained constant and never increased, it does not follow that the identity of the composers filling those roles is also a constant. To look no further than our own Congress as analogy, the number of seats that existed in the 99th Congress is the same as it is today in the 100th Congress, but there are at least 63 new faces present and an equal number of old ones missing.

Overall percentages, too, can often be misleading and, as the proponents of S. 698 are fully aware, that is very much the case in this instance. BMI and ASCAP are required by consent decree to accept virtually everyone who wants to join. As a result, each of us has a large constituency that can best be categorized as hobbyists and whose works are rarely - if ever - performed.

Much more to the point, however, is whether or not the Senate should be asked to legislate primarily in terms of how many people benefit from a particular activity. If that is a primary consideration, then it must be pointed out that the number who benefit economically from television's free use of the public airwaves is a minute fraction of the population. There are, after all, fewer than 1,000 commercial television stations in the country and more than half of those are owned by just 160 companies. In the entire state of Iowa, for example, there are only 16 commercial stations and a third of those are owned by groups headquartered elsewhere.

7. BECAUSE BROADCASTERS CONTEND THAT THEY HAVE ASKED THE STUDIOS FOR SOURCE LICENSES FOR THE MUSIC IN THEIR SYNDICATED TELEVISION PROGRAMS WHILE ALLEGING THAT THE STUDIOS HAVE REFUSED TO BARGAIN SERIOUSLY OVER THIS ISSUE, HAVEN'T THE ONLY CONCESSIONS ACHIEVED BY THE BROADCASTERS BEEN BASED UPON THE PRESSURE OF LAWSUITS AGAINST ASCAP AND BMI?

BMI Responses To Questions From Senator Grassley (continued)

The simple answer for BMI is emphatically NO!

The current television agreement, for example, was negotiated after the Buffalo Broadcasting case had been decided - after the the broadcasters had clearly lost their appeal - and yet, as a result of the negotiation, BMI reduced the current license fee.

Moreover, at that same time, we offered a mechanism to submit future differences to binding arbitration. That offer was rejected by the broadcasters.

Insofar as the broadcasters' contention that they have tried, unsuccessfully, to obtain source licenses from the studios, the claim is one that they have made repeatedly. Claims and facts, however, can be two very different things and, in this instance, they are. Every time the proponents - in either court or hearing room - have been asked to substantiate their allegations, they have been unable to do so.

8. ISN'T IT CORRECT THAT THIS BILL DOES NOT AFFECT THE USE OF MUSIC IN RADIO, RESTAURANTS, CONCERT HALLS, AND TELEVISION NETWORK PROGRAMMING?

While the statement is technically correct, we also know that these other user groups do not function in a vacuum. The mere fact that they may appear to have adopted a passive "wait-and-see" attitude is in no way indicative of disinterest. Quite to the contrary!

BMI Responses To Questions From Senator Grassley (continued)

As only one example there are already very clear indications that the television networks are positioning themselves to take advantage of the proposed legislation if it should become law. On an even broader plane, the National Association of Broadcasters (NAB) which represents all parts of the broadcast industry, actively supports S. 698 and we have already received indication that the thousands of radio stations broadcasting syndicated material have begun considering a similar legislative proposal.

If one group of artists can be told that their creative products must be sold only to a specific group of purchasers, and only at a particular time, then there is no doubt that other groups will be told the same thing. The only question is, how quickly will the avalanche begin. As we all know from experience, even the most innocuous seeming legislation - and S. 698 is hardly that - can suddenly become a vehicle for far more than its original sponsors ever intended.

9. WHAT, IF ANY, EFFECT WILL THE ENACTMENT OF S. 698 HAVE UPON THE OPERATION OF THE PERFORMING RIGHTS SOCIETIES?

Insofar as the entire BMI family is concerned, passage of S. 698 would have a major economic impact!

The reason is quite clear. BMI's overhead is spread across all of its activities and the removal of one of those activities would have very little effect on the overall.

Thus, if the elimination of an income source such as local television did not also reduce overhead - and it would not - then there would be less total money available for royalty distribution. The entire membership, therefore, would suffer.

Responses to Questions from Chairman DeConcini

10. THE BROADCASTERS HAVE ACCUSED THE PERFORMANCE RIGHTS SOCIETIES OF BEING UNREASONABLE IN NEGOTIATIONS. HAVE THE PERFORMANCE RIGHTS SOCIETIES TAKEN ANY ACTION TO DISCOURAGE TELEVISION SYNDICATORS FROM NEGOTIATING SOURCE LICENSE OR PER PROGRAM AGREEMENTS WITH BROADCASTERS?

No!

As a part of their Buffalo Broadcasting case, the proponents tried to show that they had been repeatedly rebuffed in their attempts to obtain licenses directly. After reviewing all of the facts, however, the Appellate Court concluded that the there was no evidence to show "that any local station ever offered any composer a sum of money in exchange for the performance rights to his music." Moreover, the court noted also that "The stations showed no interest in source licensing even during the period from 1950 to 1972 when the 'carve out' provision of the blanket license issued by BMI permitted a station to deduct from the revenue base of the blanket fee the revenue from programs for which music performing rights were cleared at the source..".

To the best of our knowledge, no compelling evidence to the contrary has yet been put forth.

11. HAVE THE PERFORMANCE RIGHTS SOCIETIES TAKEN ANY ACTION TO DISCOURAGE ITS MEMBERS FROM ENTERING INTO SOURCE LICENSE OR PER PROGRAM AGREEMENTS WITH MOVIE STUDIOS OR TELEVISION STATIONS?

IF AN INDIVIDUAL COMPOSER WERE ABLE TO GET A GOOD AGREEMENT WITH A MOVIE STUDIO FOR A SOURCE LICENSE, HOW WOULD THAT EFFECT THE BLANKET LICENSE PAID BY A BROADCASTER WHO ACQUIRED THE PROGRAMMING THAT WAS SOURCE LICENSED? COULD THE BROADCASTER SUBTRACT THE AMOUNT PAID FOR THE PERFORMANCE RIGHT TO THE MUSIC IN THE PROGRAM FROM HIS BLANKET LICENSE PAYMENT?

Responses to Questions from Chairman DeConcini (continued)

The terms of our agreements make it emphatically clear that composers give us only a non-exclusive right to license their works. Any time they wish to enter into a direct license for a particular event or type of use, they are clearly free to do so.

As to the second part of your question, a mechanism does presently exist whereby source-licensed material can be excluded from the payment base. Under a per-program agreement, the broadcaster pays a fee only for those programs that require a license from BMI. A program that has been licensed at the source requires nothing further from BMI.

For many years, as repeatedly testified, and confirmed in court, a "carve out" mechanism was contained within the blanket agreement. It was taken out of the contract at the broadcasters' request and, as Mr. Arries affirmed during the hearings you recently conducted (11/10/87), it had never been used. It is not present in the current BMI license which Mr. Arries, himself, characterized as "a good agreement".

Recently, as an outgrowth of the Buffalo case, the "carve out" provision was put back into place for some 18-months. We respectfully suggest that the broadcasters be asked how many took advantage of it this second time around.

12. IT SEEMS TO ME THAT THE BROADCASTERS BIGGEST OBJECTION TO THE PRESENT BLANKET LICENSE SYSTEM IS THAT THEY HAVE TO PAY FOR MUSIC PUBLISHING SERVICES THEY DO NOT USE, AND FOR WHAT THEY CONSIDER TO BE THE EXORBITANT ADMINISTRATIVE COSTS OF THE PERFORMANCE RIGHTS SOCIETIES.

Responses to Questions from Chairman DeConcini (continued)

12. (continued) ISN'T IT TRUE THAT THE PAYMENT OF THE BLANKET LICENSE AMOUNT TO THE PERFORMANCE RIGHTS SOCIETIES IS HIGHER THAN THE ACTUAL COSTS TO THE PERFORMANCE RIGHTS SOCIETIES OF ADMINISTERING THE BLANKET LICENSE? WOULDN'T IT BE FAIRER IF THE TELEVISION BLANKET LICENSE PAYMENT TO THE PERFORMANCE RIGHTS SOCIETIES MORE ACCURATELY REFLECTED THE SERVICES ATTRIBUTABLE TO TELEVISION MUSIC?

We respectfully suggest that the question is, in part, based on misinformation regarding the present system of synchronization, or placement, of music on the actual film or video tape; the licensing of that music; and the distribution process of the fees collected by BMI.

At the outset, it is the music publisher who makes the necessary arrangements so that the desired music can be synchronized - or added into - the film or video tape. In many instances, and substantially all of those involving the use of feature music, the music was pre-existent.

A specific example is the song, "Georgia On My Mind". The music is used throughout the popular television series "Designing Women", but it was written at least 60 years before the program was ever conceived. Throughout that half century, however, the publisher maintained the music in his catalog and expended both time and effort to ensure it was used whenever possible.

Insofar as the amount of fees received by BMI, that amount must - by necessity - exceed any administrative costs. If it did not, then there would be nothing left to distribute to the various copyright holders. Very simply, if BMI receives $100 from a station and the administrative costs equal approximately $15, then the remaining $85 is distributed to our affiliates.

As to the value of music to a program, that can best be answered by a line from one of Mr. Justice Holmes' landmark decisions. Referring, of course, to something other than television, the Justice said, "If music did not pay it would be given up." And clearly, where television programming is concerned, the music does pay and it is the program user - the broadcaster - who ultimately profits from its use.

The purpose of that music, very simply, is to make the program more pleasing and more recognizable or, in a word, more "attractive" to the viewing public. It is used in virtually every program for just that purpose and it is precisely because of that "attractiveness" that the broadcaster is willing to spend considerable money to purchase his various program products.

As to the question of "fairness", that, perhaps, was best answered by those who actually pay all of the broadcasters' operating costs. As members of the advertising industry testified, they not only feel that the present system is fair, but they also feel that the legislation - as proposed - would be unfair.

13. TESTIMONY INTRODUCED IN THE BUFFALO BROADCASTING CASE INDICATED THAT IN 1979, 12 OF THE TOP 15 TELEVISION MUSIC PUBLISHERS WERE SUBSIDIARIES OF 8 MOVIE STUDIOS. AT THE HEARING YOUR PANEL AGREED TO FURNISH THE COMMITTEE UPDATED FIGURES ON HOW MANY OF THE TOP FIFTEEN MUSIC PUBLISHERS CURRENTLY RECEIVING MONEY FROM THE TELEVISION BLANKET LICENSE ARE AFFILIATED WITH MOVIE PRODUCERS.

Responses to Questions from Chairman DeConcini (continued)

Our records do not generally contain information regarding the corporate parentage of affiliated publishers, but, after reviewing a list of the fifteen publishers with the greatest television theme and background earnings aggregated over the most recent four distribution quarters, the following appears to be the case:

- Six are entirely motion picture company affiliated.
- Six are, or were until recently, owned by companies with substantial broadcast station holdings.
- Three are owned by companies that, to the best of our knowledge, have no corporate relationship to either broadcast or motion pictures.

14. ONE OF THE BIGGEST COMPLAINTS THAT BROADCASTERS HAVE ABOUT THE BLANKET LICENSE IS THE PAYMENT OF THE MUSIC PUBLISHER'S FEE TO THE MOVIE STUDIOS WHOM THEY ARE ALREADY NEGOTIATING WITH FOR THE PROGRAMMING. SURELY IF THE MOVIE STUDIO IS THE PUBLISHER IT COULD ACQUIRE THE PERFORMANCE RIGHT FOR THE MUSIC IN THE PROGRAMMING.

WOULD YOU OBJECT TO A PROVISION THAT WOULD REQUIRE SOURCE LICENSING ONLY OF THE PUBLISHER'S INTEREST WHERE THAT PUBLISHER WAS OWNED BY THE PRODUCER? WOULDN'T SUCH A PROVISION ASSURE THE COMPOSER OF THE SAME AMOUNT OF COMPENSATION THAT THEY ARE NOW RECEIVING?

The specific provision you suggest is, in our view, unnecessary. There is nothing that currently prevents such arrangements from being negotiated. In fact, it is just one of at least four licensing alternatives that presently exist.

Responses to Questions from Chairman DeConcini (continued)

To answer your question more directly, however, we do not believe that such an arrangement should be mandated. To legislatively eliminate three of four present options would not be in the best interests of music users or composers. It would, moreover, be contrary to a principle that has been embodied in the Copyright Law for nearly a century.

It is a basic tenet that copyright is a bundle of separate, and divisible, rights. In the case of music, one of those rights is the right of public performance. Another is the right to record or synchronize the music with film. This idea of a divisible bundle of rights was reinforced under the extensive Copyright Law revision, effective January 1978, and it is a concept adhered to in virtually every country that recognizes the idea of copyright.

Additionally, the hybrid arrangement implied would considerably complicate our current administrative tasks. Overhead costs, therefore, might be forced up while - at the same time - income level was reduced. Since we function as a non-profit making organization, it follows that, under this plan, we would now have less money available for composer compensation.

15. WHAT SERVICES DO THE TELEVISION STATIONS THEMSELVES RECEIVE FROM THE MOVIE PUBLISHING COMPANIES?
    WHAT SERVICES DO THE TELEVISION STATIONS RECEIVE FROM THE PERFORMANCE RIGHTS SOCIETIES?

Responses to Questions from Chairman DeConcini (continued)

Insofar as the first half of the question is concerned, BMI would prefer to have the publishers answer for themselves regarding the services they provide. It is clear to us, however, that they shoulder considerable responsibility by actively seeking all possible commercial uses for the music they publish, encouraging new composers and, in general, assuring the broadcaster of a continued, highly inventive supply of a product that would be sorely missed if it were not present.

As to the second part of the question, BMI provides many indirect services to the broadcaster. These are all part of the record and need not be repeated here. We realize, however, that one very direct service has, somehow, had little more than oblique mention in the past.

It is the responsibility - under law - for the music user to obtain permission, before use, from the copyright owner for any music to be performed publicly. Translated into simple, administrative mechanics, each television station would have to maintain a staff whose only responsibility would be to track down - beforehand - every copyright owner for every piece of music they wished to use and to negotiate a license fee for the use of that music. The size of that staff, and the cost to each station for the additional salaries, benefits, etc. is mind-boggling.

Fortunately for the television station owner there is an alternative. The performing rights organizations provide this service to them. In addition, under a BMI license, the user receives a very broad indemnification against infringement claims that may arise from the public performance of music.

The cost to any single station for all of this is undoubtedly far less than it would be if that same station chose to negotiate for the rights individually.

BMI Responses to Questions from Senator Leahy

16.THE BROADCASTERS ARGUE THAT UNDER THE CURRENT COPYRIGHT LAW, MILLIONS OF DOLLARS END UP IN THE POCKETS OF HOLLYWOOD STUDIOS AND ASCAP (OR BMI) INSTEAD OF THE COMPOSERS, AND THAT 20 PERCENT OF YOUR OPERATION GOES TO OVERHEAD. HOW DO YOU RESPOND TO THESE CHARGES?

The argument is faulty on all counts. First, it implies that most active TV syndicators have publishing subsidiaries. This is simply not true!

Second, it implies that whatever money does go to publishers is, somehow, unearned. This is also not true!

Third, it implies that the performing rights organizations are some sort of profit-making institutions. Another untruth! Both BMI and ASCAP are non-profit making service organizations.

As to the 20% overhead figure, even if it were accurate - though, as we have already testified, for BMI it is less than 15% - it would not be unreasonable. We wonder if television station overhead is anywhere near as low. More to the point, however, is the indisputable fact that none of those who share in the distribution of performance license fees - composers or publishers, alike - have come before this committee to express any concern regarding the overhead.

Frankly, we can not help but be wryly amused by the one overall implication inherent in their argument. Somehow, it appears, the broadcaster is trying to cast himself as one whose only concern is the welfare of the composer. They would like you to believe, it seems, that their prime motive in propounding this legislation is the protection of the composer.

BMI Responses to Questions from Senator Leahy (continued)

17. WHAT DISTINGUISHES THE LICENSING OF PERFORMANCE RIGHTS FOR SYNDICATED TELEVISION PROGRAMMING FROM THAT OF THEATRICAL DISTRIBUTION OF MOTION PICTURES? WHY SHOULD THERE BE DIFFERENT LICENSING SCHEMES?

A similar question was asked by Senator Grassley. We respectfully direct your attention to our response to Question 5 in this document.

18. I'VE HEARD THAT PEOPLE ASK IF BROADCASTERS WANT SOURCE LICENSING SO MUCH, WHY HAVEN'T THEY TRIED TO SECURE IT IN THE FREE MARKET. BUT WHY WOULD BROADCASTERS SEEK SOURCE LICENSING IF THEY HAVE TO PURCHASE A BLANKET LICENSE ANYWAY AND THE BLANKET LICENSE WILL COVER ANY MUSIC LICENSED AT SOURCE?

We cannot speak to the motives of others, but it would seem to us that a basic answer is that the broadcasters actions give lie to their words. They do not have to accept a blanket license! Source, direct or per-program licenses are all readily available, separately or in combination, but, in spite of that, they have almost always taken the blanket.

For additional detail, we respectfully call your attention to our response to Question # 11.

19. DO YOUR BLANKET LICENSING AGREEMENTS PROVIDE FOR ANY REDUCTION IN THE FEE IF BROADCASTERS HAVE GONE TO THE TROUBLE OF SECURING SOME SOURCE LICENSING FOR THE MATERIAL BEING USED? IF NOT, WHY NOT?

Such a provision did exist for a great many years - both prior and subsequent to the Buffalo case - but, for whatever reason, broadcasters chose not to take advantage of it. There is, however, no real need for such a provision within the blanket license since it is an inherent part of the current per-program form.

Moreover, for all of those years during which they could have "carved out" any source licensing payments from their blanket license fees, they chose not to. In fact, as the incontroverted testimony in both the Buffalo case and before your committee shows, it was the broadcaster - not BMI - who insisted that the provision be removed.

We, again, respectfully direct your attention also to our response to Question # 11.

20. WHAT MARKETPLACE ALTERNATIVES ARE AVAILABLE TO THE BROADCASTERS THAT THEY HAVE NOT USED?

As the Court of Appeals decision in the Buffalo case - as well as the various hearings records - show quite clearly, a myriad of options exist and are viable alternatives. Among them are source licenses, direct licenses and per-program licenses. For reasons known best to themselves, television broadcasters have traditionally chosen to ignore them all. The Court of Appeals did postulate, however, and, in their Buffalo Broadcasting decision, said "The fact that very few stations have elected to take (per) program licenses...may simply reflect...that the blanket license has virtues of convenience that make it a legitimate object of customer preference."

- - - -

156 WEST 56TH STREET NEW YORK, NEW YORK 10019 212 586-3450

[illegible]
[illegible]

December 18, 1987

The Honorable Dennis DeConcini
Chairman
Subcommittee on Patents,
Copyrights and Trademarks
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6275

Dear Senator DeConcini:

Enclosed are my answers to the supplemental questions re S.698 received from you, Senators Grassley, Leahy, and Thurmond, for inclusion in the record. I hope that they will be of meaningful assistance to the Subcommittee in its consideration of this matter.

Once again, may I say that I appreciate the opportunity you have allowed me to present the views of my company which, as you know, is a very, very small business compared to the "major players" involved. I must confess to you that all too often I feel as if SESAC and the composers and publishers we represent are bystanders in an all-out war being waged by long-standing antagonists. Our constant fear is that we may become innocent victims of that conflict by enactment of legislation which has nothing at all to do with the reality of our 57-year-old harmonious and businesslike relationship with the broadcasting industry. Such a law will not only seriously jeopardize that relationship, it will make it impossible for us to survive. My hope is that Congress will not throw out the baby with the bath water! Unfortunately, S.698 will do just that, and I again plead that it be rejected.

I thank you and all of the members of the Subcommittee for the many courtesies extended to me, and remain

Cordially,

AHP:MT

ANSWERS BY ALICE H. PRAGER, CHAIRMAN AND PRESIDENT, SESAC INC.

TO QUESTIONS SUBMITTED FOR THE RECORD BY SENATOR CHARLES E. GRASSLEY

HEARING ON S. 698

Q. 1. How many members of ASCAP and BMI in Iowa have received over $50 from these performing rights organizations for the music included in syndicated television programs and commercials during the last year?

A. 1. This question is directed to ASCAP and BMI and I therefore leave it to them to answer.

Q. 2. Since blanket performance licenses originated when only "live" performances were possible, aren't they inappropriate for the contemporary television industry due to the fact that today's programming is taped in advance and thus it is capable for all parties to negotiate for all the rights contained in a given program all at once?

A. 2. To negotiate a fee for the public performance of music based on a program taped in advance and prior to broadcast would place the composer of the music or his agent at a competative disadvantage. There is no way to determine the size of the public that will hear the performance.

Should a composer not be compensated based on public acceptance? Many programs are taped well in advance of knowing the proper factors in order to determine a fair fee, e.g., the number of stations that will buy the program; how many stations are in major markets; how many are top rated stations; what time of day will the program air, etc. It makes no difference, live or taped; it is the size of the public, and its acceptance of the program, that counts.

Q. 3. Aren't the large television production corporations the real beneficiaries of the blanket license system--because composers are hired by a particular studio to write the music for a television show, while the studio maintains the rights to the music?

A. 3. This question appears to be directed to ASCAP and BMI and not SESAC because we are unaware of any SESAC composer affiliate who has been hired by the so-called "large television production corporations" or studios referred to as "the real beneficiaries of the blanket license system." As far as we know, SESAC affiliates who have composed music contained on television shows have not been hired by any large television production corporation or studio to write music for shows produced and owned by them. On the other hand, we do know that music written by SESAC-affiliated composers is contained on such programs as The Jeffersons, a popular TV syndicated program today, and to our knowledge the producer of that program has no rights to that music.

Q. 4. Aren't the rights fees collected by ASCAP paid to the company that publishes the music for the program--which is usually a subsidiary of the television production company--and which in turn gives a portion of the fee to the composer?

A. 4. This question is directed to ASCAP and I therefore leave it to ASCAP to answer.

Q. 5. Would you explain the difference between how a local television station is treated and how a movie theater is treated when a music performance is licensed?

A. 5. Rather than unnecessarily burdening this record, as its answer to this question SESAC subscribes to the response of Mr. Jack Valenti, President, Motion Picture Association of America, Inc., to questions numbered 1 which were submitted for the record by Senators Patrick Leahy and Strom Thurmond in the 1986 hearing on S. 1980.

Q. 6. Wouldn't a system of source licensing for the performance rights of music contained in syndicated television programming affect only a small number of composers, since only a small number now receive compensation for such programming?

A. 6. Speaking only for itself, SESAC's answer to this question is NO. The actual performance of music in all areas, including performances in syndicated television programs, is given due recognition by SESAC through its system of royalty distribution to its affiliates. Under SESAC's system all of our affiliates enjoy, to a reasonable and meaningful extent, the benefits derived from all performances.

Q. 7. Because broadcasters contend that they have asked the studios for source licenses for the music in their syndicated television programs while alleging that the studios have refused to bargain seriously over this issue, haven't the only concessions achieved by the broadcasters been based upon the pressure of lawsuits against ASCAP and BMI?

A. 7. Here, too, this question is directed to ASCAP and BMI and we leave it to them to answer.

Q. 8. Isn't it correct that this bill does not affect the use of music in radio, restaurants, concert halls, and television network programming?

A. 8. This bill would have a substantial adverse impact on the compensation received by creators of music used in all media. The incentive to create music will be seriously diminished and, in turn, both the quantity and quality of music available for use in radio, restaurants, concert halls and television network programming will deteriorate. We submit that this bill would have grave consequences far beyond the intentions of its legislative proponents.

Q. 9. What, if any, effect will the enactment of S. 698 have upon the operation of the performing rights societies?

A. 9. In response to this question I respectfully refer to my supplemental statement (a copy of which is attached) enclosed with my letter of November 30, 1987 to Senator DeConcini.

ANSWERS BY ALICE H. PRAGER, CHAIRMAN AND PRESIDENT, SESAC INC.

TO QUESTIONS SUBMITTED FOR THE RECORD BY SENATOR DENNIS DE CONCINI

HEARING ON S. 698

Q. 1. The broadcasters have accused the performance rights societies of being unreasonable in negotiations. Have the performance rights societies taken any action to discourage television syndicators from negotiating source license or per program agreements with broadcasters?

A. 1. SESAC can only speak for itself in answering this question, and its answer is an unequivocal NO!

Q. 2. Have the performance rights societies taken any action to discourage its members from entering into source license or per program agreements with movie studios or television stations?

A. 2. Speaking for itself alone, SESAC has not taken any action to discourage any affiliate having the right to do so from entering into a source license agreement with movie studios or television stations. This is not to say that we have refrained from expressing our honest opinion concerning our opposition to source licensing.

Q. 3. If an individual composer were able to get a good agreement with a movie studio for a source license, how would that affect the blanket license paid by a broadcaster who acquired the programming that was source licensed? Could the broadcaster subtract the amount paid for the performance right to the music in the program from his blanket license payment?

A. 3. In theory, it would appear that some credit should be given for the source license payment. However, it is unlikely that any such credit would be anywhere close to the amount of the source license payment. The reason for this is that a blanket license fee is much, much less than the sum of its parts, its parts being the individual performance license fees which would be paid for the right to perform each individual composition covered by the blanket license if there were no blanket license. This is so not only because of the obvious economics involved, but also because SESAC due to its size bases payments to its composers and publishers on factors such as chart schedules that reflect performances on a nation-wide basis. Further, writers know what they can earn at the other performing rights organizations and the rules of free enterprise demand that SESAC be competitive. The proposal therefore would in the end raise the administrative cost by complicating the manner in which we pay composers. Computer technology of recent years has worked towards reducing the cost of obtaining information in mass. To take that total information and pull out exemptions reduces the cost efficiency of obtaining that information. In further response to the question, I respectfully refer the Senator to my answer to question 2 put by Senator Grassley.

Q. 4. It seems to me that the broadcasters biggest objection to the present blanket license system is that they have to pay for music publishing services they do not use, and for what they consider to be the exorbitant administrative costs of the performance rights societies.

Isn't it true that the payment of the blanket license amount to the performance rights societies is higher than the actual costs to the performance rights societies of administering the blanket license? In other words, doesn't the television music blanket license subsidize other activities of the performance rights societies? Wouldn't it be fairer if the television blanket license payment to the performance rights societies more accurately reflected the services attributable to television music?

A. 4. It certainly is "true that the payment of the blanket license amount... is higher than the actual costs...of administering the blanket license." It could not be otherwise because if the blanket license amount were equal only to the costs of administering the blanket license, there would be no monies left to compensate the writers and publishers of the music licensed under the blanket license. In such a case, the writers and publishers would be giving away their performing rights free, except for the costs involved in making such a gift. It is SESAC's position that the television blanket license payments it receives are a minimal reflection of the value of the rights enjoyed by our television licensees.

Q. 5. Testimony introduced in the Buffalo Broadcasting case indicated that in 1979, 12 of the top 15 television music publishers were subsidiaries of 8 movie studios. At the hearing your panel agreed to furnish the Committee updated figures on how many of the top fifteen music publishers currently receive money from the television blanket license are affiliated with movie producers.

A. 5. SESAC was not a party to the Buffalo Broadcasting case and therfore this question is not pertinent to it.

Q. 6. One of the biggest complaints that broadcasters have about the blanket license is the payment of the music publisher's fee to the movie studios whom they are already negotiating with for the programming. Surely if the movie studio is the publisher it could acquire the performance right for the music in the programming.

Would you object to a provision that would require source licensing only of the publisher's interest where that publisher was owned by the producer? Wouldn't such a provision assure the composer of the same amount of compensation that they are now receiving?

A. 6. In SESAC's opinion, there is no way in the real world that a form of mass licensing which would require separate licenses from separate sources for performances of the same composition could be practically implemented. Such an arrangement would be unworkable under the literally hundreds of thousands of agreements between publishers and composers and under the agreements between publishers and composers on the one hand, and on the other hand, the organizations which represent their performing rights.

Q. 7. What services do the television stations themselves receive from the movie publishing companies?

A. 7. As a practical matter, this question appears to be directed to the situation concerning ASCAP and BMI, and SESAC therefore leaves it to them to answer.

Q. 8. What services do the television stations receive from the performance rights societies?

A. 8. By purchasing a blanket license from the performance rights societies a television station is virtually relieved from the necessity of identifying, locating, and obtaining through negotiation, an agreement from each composer and publisher for every piece of copyrighted music that is transmitted by the station's telecast prior to such transmission.

ANSWERS BY ALICE H. PRAGER, CHAIRMAN AND PRESIDENT, SESAC INC.

TO QUESTIONS SUBMITTED FOR THE RECORD BY SENATOR PATRICK LEAHY

HEARING ON S.698

Q. 1. The broadcasters argue that under current copyright law, millions of dollars end up in the pockets of Hollywood studios and ASCAP instead of the composers, and that 20 percent of your operation goes to overhead. How do you respond to these charges?

A. 1. This question concerns ASCAP, and therefore SESAC leaves the answer to that organization.

Q. 2. What distinguishes the licensing of performance rights for syndicated television programming from that of theatrical distribution of motion pictures? Why should there be different licensing schemes?

A. 2. This question is essentially the same as question 5 put by Senator Grassley, and we respectfully refer to our answer to that question in answering this question.

Q. 3. I've heard that people ask if broadcasters want source licensing so much, why haven't they tried to secure it in the free market. But why would broadcasters seek source licensing if they have to purchase a blanket license anyway and the blanket license will cover any music at the source?

A. 3. The only logical answer would be that they believe the cost of obtaining many source licenses would be less than that of a blanket license, this would assume that all of the composers and publishers would be willing to accept a smaller fee for the performance of their music so that the sum of the parts is less than the whole. If however the station still requires a blanket license to cover authorization for music used that is not source licensed it will prove to increase their cost for music performance rights.

Q. 4. Do your blanket licensing agreements provide for any reduction in the fee if broadcasters have gone to the trouble of securing some source licensing for the material being used? If not, why not?

A. 4. SESAC's blanket license agreement does not provide for any reduction in the fee if a licensed broadcaster has secured a source license. The blanket license fee paid is to provide the broadcaster with total availability to our repertory. I respectfully refer to SESAC's answer to question 3 put by Senator DeConcini.

Q. 5. What marketplace alternatives are available to the broadcasters that they have not used?

A. 5. To the best of our knowledge broadcasters have not offered to pay program producers a realistic and meaningful sum of money in addition to the money they are now paying for those programs, to cover a source performance license for the music contained in those programs. As far as we know the broadcasters work to continue to pay only what they are now paying for those programs, and also get music clearance, leaving it to the program producer to share the money he receives with the composers and publishers of the music.

ANSWER BY ALICE H. PRAGER, CHAIRMAN AND PRESIDENT, SESAC INC.

TO QUESTION SUBMITTED FOR THE RECORD BY SENATOR STROM THURMOND

HEARING ON S. 698

Q. Please describe how SESAC distributes revenues collected from television stations to composers and publishers. Specifically, what percentage of money collected is tributed to composers, what percentage to publishers? How much were SESAC's administrative costs and what were its profits for its total operations in 1986?

A. SESAC distributes revenue received from its licensees to its composer and publisher affiliates pursuant to the provisions of its affiliation agreements with them. SESAC's affiliation agreements do not make any distinction between revenue received from television stations and revenue received from other performance licensees. License fees from all sources are treated as a single entity; i.e., the license fees from radio stations, television stations, hotels, night clubs, etc. go into a "single pot," so to speak, and it is from that "pot" that all affiliates are paid their share of revenues received from all collective transactions. That distribution is made pursuant to considerations which as specified by our agreement "result in an equitable allocation and distribution among SESAC's" affiliates.

With respect to SESAC's administrative costs and profits, I respectfully submit that they are no more relevant to the issue at hand than they are to the position of those who support S. 698. Nevertheless, I believe it appropriate to refer to my Supplemental Statement enclosed with my letter of November 30, 1987 to Senator DeConcini.

Senator DeConcini. The next panel will be Mr. William Cotton, American Association of Advertising Agencies, and Mr. Robert Wehling, Association of National Advertisers.

Gentlemen, thank you for waiting so long. I had no idea we'd still be here at 12 minutes to 1. We appreciate your traveling here and being with us today.

If you would summarize your statements, your full statements will be printed in the record as if read.

Mr. Cotton.

STATEMENT OF WILLIAM C. COTTON, AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, INC., NEW YORK, NY

Mr. Cotton. Thank you, Mr. Chairman.

Thank you for giving us this opportunity to register our opposition to S. 698. Although we may be last in the panel here, I certainly hope you won't consider us the least as far as this is concerned.

My name is William Cotton. I am vice president of broadcast business affairs at Wells, Rich, Greene, a New York- based advertising agency. I'm representing the American Association of Advertising Agencies which comprises 740 agencies responsible for about three-quarters of all the national advertising. I'm the chairman of the broadcast administration policy committee.

Our member agencies and the advertisers that they serve find this legislation very troubling. We are, you see, two of the basic six parties involved in the music used in advertising: advertising agencies, advertisers, composers, performing rights societies, music publishers, and broadcasters.

The reason we find this legislation troubling is because it needlessly intrudes into a system that is working to the satisfaction of only one of these parties, the broadcasters. Radio, syndicated and nonsyndicated local television, and network television form a highly integrated entity called American Broadcasting. We feel that a change in the manner of performance rights payments for local syndicated television music, a minuscule portion of the total, will seep into all other parts of broadcasting in this country.

There's also an international system at stake here, sir. Other countries in this free world utilize a system similar to the American method of performance rights societies.

S. 698 tinkers with one cog in a very complex machine. Remove that cog and it would spread chaos throughout the system for the special interests of only one party, the broadcasters.

We also feel it would be very expensive. Perhaps passage of this legislation could cost advertisers as much as $150 million a year. I'd be glad to explain that at a later time, sir. I don't believe we have time right at this moment.

Senator DeConcini. You could submit that explanation for us because it would be helpful. That's a lot of money.

Mr. Cotton. Most certainly.

In addition to costing the advertisers this fee, it would also cost advertising agencies millions of dollars just to staff up to handle this type of operation. We currently feel that there are no more than 15 or 20 advertising agencies in this business that have the personnel that could possibly handle the music performance rights. This enormous task for which few of these agencies are staffed is handled so efficiently currently by ASCAP, BMI, and SESAC.

In addition to these 740 advertising agencies that 4 A's represents, there are approximately 3,300 additional agencies in this country, and a very large percentage of them would be utilizing music on behalf of their clients. Certainly very few of them would have the manpower or the expertise to work on this type of situation.

But the most disturbing aspect of this measure is that the advertisers would be required to pay for what is truly a broadcasting expense, sir. An advertising agency creates a message for its client and delivers it to a station ready to be broadcast. It's then the broadcasters job to perform the music included in that message by broadcasting it. The additional cost for this right is a broadcasting expense which is passed on to advertisers through the price they pay for media time.

It's a situation analogous to the delivery of a phonograph recording to a broadcaster. The record is delivered ready to be played. It's up to the broadcaster to pay for the right to perform the music on his station.

Passage of this legislation would result in financial restrictions on creative choices regarding the use of music in commercials and provide a financial windfall to the broadcasters. Performance rights are part of broadcasting. Logic demands that broadcasters continue to assume these rights.

I would like to reiterate the 4 A's position statement that was made when this legislation was originally proposed. We said then that enactment of the legislation would inevitably cause administrative chaos in music licensing for televised advertising, higher costs to advertisers, lower payments to composers, and less use of music in televised advertising.

The current system, the fairness of which has been upheld by the courts, has been in use for over 40 years. It protects the composers, the publishers. It's universally accepted. It's fair to all parties and it works.

I know we have very little time so I'd like Mr. Wehling to take over at this point.

[The prepared statement of Mr. Cotton follows:]

AAAA
American Association of Advertising Agencies Inc., 666 Third Avenue, New York, N.Y. 10017 • (212) 682-2500
Telex: 6973425 AAAA UW

Testimony of William Cotton
Vice President of Broadcast Business Affairs
Wells, Rich, Greene, Inc.
on behalf of
The American Association of Advertising Agencies
before the Subcommittee on Patents, Copyrights and Trademarks
of the U.S. Senate Committee of the Judiciary
November 10, 1987

S.698

Summary of testimony by William C. Cotton on Senate Bill S.698

The American Association of Advertising Agencies, its 740 member firms, and the advertisers they serve find this legislation very troubling, for these reasons:

1. It needlessly intrudes into a system that is working well; it tinkers with one cog in a very complex machine, and, for the special interest of only one party--the broadcasters--would spread chaos throughout the system.
2. It would be very expensive, costing advertisers as much as $150 million a year and costing agencies many millions yearly in administrative expenses. This enormous task is currently handled efficiently by ASCAP, BMI, and SESAC.
3. The most disturbing aspect is that advertisers would be required to pay for what is truly a broadcasting expense. The broadcaster's job is to perform the music included in a message by broadcasting it. The cost for this is passed on to advertisers through the price they pay for media time.
4. This legislation would result in financial restrictions on creative choices on the use of music in commercials, and would provide a windfall to broadcasters.
5. In summary, this legislation would cause administrative chaos in music licensing for televised advertising, higher costs to advertisers, lower payments to composers, and less use of music in televised advertising. The current system, in use for more than 70 years, protects composers and publishers, is universally accepted, and is fair to all parties. It works.

* * *

Mr. Chairman, thank you for this opportunity to register our opposition to S.698. My name is William Cotton and I am Vice President of Broadcast Business Affairs at Wells, Rich, Greene, Inc., a New York-based advertising agency. I am representing the American Association of Advertising Agencies, which comprises 740 agencies responsible for about three-fourths of all national advertising. I am Chairman of the Broadcast Administration Policy Committee. Our member agencies and the advertisers they serve find this legislation very troubling.

We are, you see, two of the six parties involved in the music used in advertising: advertisers, agencies, composers, performing rights societies, music publishers and broadcasters.

The reason we find this legislation troubling is because it needlessly intrudes into a system that is working to the satisfaction of all of those parties except the broadcasters.

Radio, syndicated and non-syndicated local television and network television form a highly integrated entity called American broadcasting. A change in the manner of performance rights payments for local syndicated television music, a miniscule portion of the whole, will seep into all other parts of broadcasting in this country. There is an international system at stake here as well; many other countries in the free world utilize a system similar to the current American method of performance rights payments.

S.698 tinkers with one cog in a very complex machine. Remove that cog and it would spread chaos throughout the system for the special interest of only one party, the broadcasters.

It would also be very expensive. Passage of this legislation could cost advertisers as much as $150 million each year. It would also cost advertising agencies many millions of dollars each year in administrative expenses to track music performances and distribute music payments. This enormous task for which few agencies are staffed is currently efficiently handled by ASCAP, BMI and SESAC. Of the 740

A.A.A.A. members, it is doubtful that more than 15 have persons with expertise in music rights. There are over 3,300 smaller non-member agencies who certainly are not staffed for this work. In either case, additional music personnel would most likely be needed at all agencies if this legislation were passed.

But the most disturbing aspect of this measure is that advertisers would be required to pay for what is truly a broadcasting expense. An advertising agency creates a message for its client and delivers it to a station ready to be broadcast.

It is then the broadcaster's job to _perform_ the music included in that message by _broadcasting_ it. The additional cost for this right is a _broadcasting_ expense, which is passed on to advertisers through the price they pay for media time. It is a situation analogous to the delivery of a phonograph recording to a broadcaster. The record is delivered ready to be played; it is up to the broadcaster to pay for the right to "perform" the music on his station.

The price of advertising music can already be prohibitively expensive. Unless music is used that is no longer protected by copyright, a fee must be paid to the composition's owner for the right to make it part of the commercial. Such fees can amount to well over $100,000 a year. Thus the advertiser has already paid substantial fees for the right to make that music part of his advertising message. The additional burden of performance rights and the attendant administrative burden should not be added to the _advertiser's_ cost.

Passage of this legislation would result in financial restrictions on creative choices regarding the use of music in commercials and provide a financial windfall to the broadcasters. Performance rights are part of broadcasting. Logic demands that broadcasters continue to assume the cost of these rights.

I'd like to reiterate what the A.A.A.A.'s position statement said when this legislation was originally proposed. We said then that enactment of the legislation "would inevitably cause administrative chaos in music licensing for televised advertising, higher costs to advertisers, lower payments to composers and less use of music in televised advertising."

The current system, the fairness of which has been upheld by the courts, has been in use for over 70 years. It protects the composers and publishers, it's universally accepted, fair to all parties, and it works.

BIOGRAPHY

WILLIAM C. COTTON

William C. Cotton serves as chairman of the Broadcast Administration Policy Committee of the American Association of Advertising Agencies (A.A.A.A.). He is also co-chairman of the Joint Policy Committee on Broadcast Talent Union Relations of the A.A.A.A. and the Association of National Advertisers (A.N.A.), which negotiates triennial contracts between the broadcast talent unions and the advertising industry.

Mr. Cotton has been vice president for business affairs at Wells, Rich, Greene, Inc., a major advertising agency headquartered in New York, since 1973. He is a trustee of the Motion Picture Players Welfare Fund, and also served as chairman of the A.A.A.A. Broadcast Union Relations Committee from 1983 to 1985. He has been active on various A.A.A.A. broadcast committees since 1964.

From 1969 to 1973, Mr. Cotton was director of broadcast business at the Warren Muller Dolobowsky agency. Before that, he held the same position at Doyle Dane Bernbach, and from 1959 to 1966 he was business manager of Grey Advertising Inc.

A graduate of City College of New York, Mr. Cotton is married and has two children. He lives in Flushing, New York.

Senator DeConcini. Thank you.
Mr. Wehling.

STATEMENT OF ROBERT L. WEHLING, REPRESENTING THE ASSOCIATION OF NATIONAL ADVERTISERS, WASHINGTON, DC

Mr. Wehling. Mr. Chairman, I appreciate the opportunity to submit this statement today on behalf of a group that I don't believe was heard from in hearings on this subject last year in either House of Congress. I'm referring to the advertisers who pay almost all of the costs associated with the commercial broadcast industry in this country, including music rights.

I'm here today in a dual capacity. First, I represent the Association of National Advertisers, which in turn represents almost 300 companies with over 2,000 subsidiaries and divisions, many of them relatively independent advertiser entities. ANA members collectively account for over two-thirds of all national and regional advertising expenditures in the United States.

My second capacity is as general marketing services manager of the Procter & Gamble Co., which manufactures a wide variety of packaged consumer goods products. P&G is generally regarded as the largest advertiser in the United States. As such, we are the producer and owner of several program properties, a major producer of commercials, a major user of broadcast media.

As with other advertisers, music plays a critically important part in the effectiveness of the advertising on many of our brands. My comments will attempt to identify the effect of the legislation you are considering on advertisers generally and on an individual firm. These effects generally fall into four areas.

First, this legislation would disrupt and create an administrative nightmare for a highly sophisticated and already complex communications business. This is because it outlaws an efficient and effective system that has worked for over 40 years without replacing it with a clearly defined, more effective, workable alternative.

Second, the proposed legislation fails to give adequate protection to owners and users of existing properties, both commercial campaigns and programs. Procter & Gamble, for example, owns a package of 193 10-to-15-year-old movies that would be affected by this problem. These properties, both commercials and programs, have been developed and contracted for in good faith in reliance on the present system. Suddenly if this bill becomes law an advertiser's right to continue using this material is controlled by some other party who at that point holds the whip hand.

Third, this bill would lead to a significant and unfair increase in the cost of advertising. Advertisers in effect already pay for music performance rights each time they purchase broadcast time at a local station. The price for that broadcast time presumably covers a station's costs, including their costs for the blanket license fees. Unless broadcasters lower their rates for broadcast time, advertisers in effect would be forced to pay twice for the performance rights used for music used in their commercials, leaving less money, incidentally, to spend buying commercial time on that station.

Finally, the long-term results of such a significant restructuring of a major industry are simply not predictable. For example, can an alternate system be found to track, measure, and record music use and insure that composers and publishers are paid for their creative work in a fair and equitable manner? In early attempts to probe this, it appears that publishers are as baffled as we are by the need to create an entirely new compensation system.

Will the added cost—which will be substantial—and the hassle and delays caused by having to negotiate separately for performance rights when it's impossible to know when, where, and for how long the music will be used, lead advertisers to simply not use music in many cases?

This bill could have unseen consequences in many areas, and it's impact on the use of copyrighted music, the broadcasting system, and the public will simply not be known until the affected parties pursue their economic interest to a new equilibrium.

If there are legitimate grievances among broadcasters regarding the current licensing system, and if the committee believes these problems cannot be resolved by the parties immediately concerned, but instead require a legislative remedy, then I respectfully suggest that these grievances be addressed directly and specifically rather than by the wholesale dismantling of a proven and effective apparatus that an important industry depends on to administer the marketplace.

Thank you for this opportunity, Mr. Chairman.

With your permission, we will in the next few days file a lengthier written version of this testimony which will provide specific examples of the problems I've only been able to touch on in these remarks.

[The prepared statements of Mr. Wehling follow:]

ANA
ASSOCIATION OF NATIONAL ADVERTISERS, INC.
1725 K STREET, N.W., WASHINGTON, D.C. 20006 • (202) 785-1525
MEMBER, WORLD FEDERATION OF ADVERTISERS

TESTIMONY OF

ROBERT L. WEHLING

GENERAL MARKETING SERVICES MANAGER

THE PROCTOR & GAMBLE COMPANY

CONCERNING TELEVISION MUSIC SOURCE LICENSING

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to submit this statement today on behalf of a group that I don't believe was heard from in hearings on this subject last year in either house of Congress. I'm referring to advertisers. Our interest in this bill is simple: In the final analysis, advertisers pay almost all the costs associated with the commercial broadcast industry in this country, including music rights.

I'm here today in a dual capacity. First, I represent the Association of National Advertisers which in turn, represents almost 300 companies with over 2,000 subsidiaries and divisions (many of them relatively independent advertiser entities). ANA members collectively account for over two-thirds of all national and regional advertising expenditures in the United States. My second capacity is as General Marketing Services Manager of The Procter & Gamble Company, which manufactures a wide variety of packaged consumer goods products. P&G is generally regarded as the largest advertiser in the United States. As such, we are the producer and owner of several program properties, a major producer of commercials, and a major user of broadcast media. As with other advertisers, music plays a critically important part in the effectiveness of the advertising of many of our brands.

My comments will attempt to identify the effect of the legislation you are considering on advertisers generally and on an individual firm. These effects generally fall into four areas:

- First, this legislation would disrupt and create an administrative nightmare for a highly sophisticated and already complex communications business. This is because it outlaws an efficient and effective system that has worked for over 40 years without replacing it with a clearly defined, more effective, or even a workable alternative.
- Second, the proposed legislation fails to give adequate protection to owners and users of existing properties ... both commercial campaigns and programs. Procter & Gamble, for example, owns a package of 193, 10-15 year old movies that would be affected by this problem. These properties, both commercials and programs, have

been developed and contracted for in good faith, in reliance on the present system. Suddenly, if this bill becomes law, an advertiser's right to continue using this material is controlled by some other party who at that point holds the whip hand.

To offer an analogy, imagine your bargaining position if you woke up tomorrow and discovered the elevators in your highrise building were controlled by someone else. Before construction, you negotiate; afterwards, you plead -- and you may end up walking if you can't afford the cost to ride.

-- Third, this bill would lead to a significant and unfair increase in the cost of advertising. Advertisers, in effect, already pay for music performance rights each time they purchase broadcast time at a local station. The price for that broadcast time presumably covers a station's costs, including the cost of obtaining a blanket license. Unless broadcasters lower their rates for broadcast time, advertisers, in effect, would be forced to pay twice for the performance rights for music used in their commercials -- leaving less money, incidentally, to spend buying commercial time on that station.

-- Finally, the long-term results of such a significant restructuring of a major industry are simply not predictable. For example, can an alternate system be found to track, measure and record music use and ensure that composers and publishers are paid for their creative work in a fair and equitable manner? In early attempts to probe this, it appears that publishers are as baffled as we are by the need to create an entirely new compensation system.

Will the added cost (which will be substantial) and the hassle and delays caused by having to negotiate separately for performance rights -- when it's impossible to know when, where or for how long the music will be used -- lead advertisers to simply not use music in many cases?

This bill could have unseen consequences in many areas, and its impact on the use of copyrighted music, the broadcasting system, and the public will simply not be known until the affected parties pursue their economic interests to a new equilibrium.

If there are legitimate grievances among broadcasters regarding the current licensing system, and if the Committee believes these problems cannot be resolved by the parties immediately concerned, but instead require a legislative remedy, then I respectfully suggest that these grievances be addressed directly and specifically, rather than by the wholesale dismantling of a proven and effective apparatus that an important industry depends on to efficiently administer the marketplace.

Thank you for this opportunity, Mr. Chairman. With your permission, we will (in the next few days) file a lengthier, written version of this testimony, providing specific examples of some of the problems I have only been able to touch on in these remarks. I will be happy to answer any questions members of the Committee may have.

SUPPLEMENTAL STATEMENT OF R. L. WEHLING

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to submit this statement today on behalf of a group that I don't believe was heard from in hearings on this subject last year in either house of Congress. I'm referring to advertisers. Our interest in this bill is simple: In the final analysis, advertisers ultimately pay almost all the costs associated with the commercial broadcast industry in this country, including music rights. This is because advertising is the sole source of most broadcasters' revenues.

I am offering this testimony in a dual capacity. First, I represent the Association of National Advertisers which is comprised of approximately 300 companies and approximately 2,000 subsidiaries and divisions, many of them relatively independent advertising entities. These companies and divisions range in size from those that annually spend a few million dollars to those that spend hundreds of millions for advertising. ANA members collectively account for over two-thirds of all national and regional advertising expenditures in the United States. My second capacity is as General Marketing Services Manager of The Procter & Gamble Company, which is the manufacturer of a wide variety of packaged consumer goods products in the soap and detergent, paper products, health and beauty aids, and food and beverage businesses. P&G is generally regarded as the largest advertiser in the United States, and perhaps the world. P&G is also a producer of programming -- three daytime serials or soap operas, several nighttime network specials, situation comedies in first-run syndication, and a variety of cable programming, totaling over 800 hours a year. However, our interest in this matter is primarily as a producer of commercials and user of broadcast media. These two hats (the ANA and P&G), I believe, permit me to address not only the effect of the legislation you are considering on advertisers generally, but to cite specific examples of how it might affect an individual firm.

I understand most of the testimony heard on this issue in the past has come from the perspective of the broadcasters, programming producers and composers, or related organizations. The advertisers' interest in this legislation springs from a somewhat different perspective insofar as its effect on the business community and the economy are concerned. As such, I believe our views are both unique and important.

As I will describe, this legislation would have several profound and detrimental effects on advertisers. They fall generally into four areas:

-- First, the legislation would disrupt and create chaos in a highly sophisticated and already complex communications industry. This is because it would outlaw an efficient and effective system that has worked for over 40 years with one many experts believe will be very inefficient, has not been adequately developed, and may not be workable. In short, it will create an administrative nightmare for our business.

- -- Second, it fails to give adequate recognition or protection to owners and users of existing properties (both programs and commercial campaigns) which advertisers, programmers and others have developed and contracted for in good faith — for extended periods in many cases -- in reliance on the present system.

- -- Third, in some cases, it would lead to a significant and unfair increase in the cost of advertising. Advertisers, in effect, already pay for music performance rights each time they purchase broadcast time at a local station. The price for that broadcast time, we assume, reflects a station's costs, including the cost of obtaining a blanket license. Unless broadcasters lower their rates for broadcast time, advertisers, in effect, would be forced to pay twice for the performance rights for music utilized in their commercials -- leaving less money, incidentally, to spend buying commercial time on that station.

- -- Finally, the long-term results of such a significant restructuring of a major industry are simply not predictable. As a result, its impact on advertisers, the use of copyrighted music, the broadcasting system, and the public will not be known until all the affected parties pursue their economic interests to a new equilibrium.

To expand on these points --

Whatever its legal and copyright origins, the current system of music licensing is essentially a commercial arrangement between certain parties which has evolved and proven itself effective for over 40 years. I have been in the advertising business for over 27 years with Procter & Gamble, and, until the last year or two, never encountered the issue. From what I have learned about it over the last several months, it seems to be a system which permits composers and publishers of music to receive compensation for the use of their creations and to do collectively what it's virtually inconceivable they could do individually -- that is to track, measure, record, collect and distribute this compensation. With the unique and added protection of judicial review of the reasonableness of the rates, the current system, including blanket licensing, brings order to an immensely complicated broadcasting and advertising business.

It might be analogous to the Social Security system. Social Security requires a central source — usually employers, to contribute and also to collect from their employees significant payments which they pass on to a mandatory insurance system. Presumably the alternative would be to have the Social Security Administration or the government collect payments directly from each individual participant. Centralized collection by employers is clearly the most efficient and effective means of administering the system. We believe this is also true of the current music licensing arrangement. It is the most efficient and effective way to collect and distribute payments to composers and publishers.

The current music licensing system in broadcast media covers a broad array of music uses. In the program area, it covers music within network programs, syndicated programs which are distributed for cash, syndicated programs bartered by distributors or advertisers to local stations, locally produced television programs, commercials of national firms, locally produced commercials, etc. These programs use music to widely varying degrees. Music may be an integral part of a program such as SOLID GOLD or DICK CLARK, or it may make a less prominent contribution such as theme music in a dramatic show.

The same is true in commercials. Some have a musical track from start to finish, and others use music only for punctuation. Sometimes, the very same song can be used prominently in one commercial and simply as a brief closing "button" in another commercial. Moreover, and more importantly, at the time of the initial contact between an advertiser or its agency and the composer or publisher, we often don't know if the commercial in which the music will appear will be used once for a copy test or result in an ongoing campaign. If it passes the copy test hurdle, it may be used in a test market in perhaps 1 to 5% of the U.S., or nationally. It may be used in a single commercial or in a pool of 6 or 7 commercials. It may last 6 months or remain on the air for 10 or more years. And, of course, there is no way for either party to know with any degree of certainty how much exposure -- how large an advertising budget -- it will get.

The point of all this is that neither the program producer nor the advertiser are in a position to commit a sizable sum of money, upfront, for music performance rights in the face of such uncertainty. Nor can a composer properly value his creation given these same uncertainties.

The alternative, of course, is some sort of reuse system or payment per usage -- which, lo and behold, is essentially the kind of monitoring and tracking and compensation functions for which the licensing organizations (BMI, ASCAP and SESAC) and for which the blanket licensing system were created. Only by such a system can the creators of a piece of music receive what is just and fair for their creative efforts.

In the area of commercials, source licensing will force this function on thousands of individual advertisers and their agencies. The administrative burden which will result will be substantial.

To give you a little perspective, my company is a very heavy user of local market television. Last year, we purchased about one million spots on local stations. We made nearly 800 commercials, over 500 of which used music to some degree. We and our advertising agencies would, if S.698 became law, need to create a mechanism to determine which of the one million spots that aired used the music of which composers and publishers, to negotiate payments for each use, and to insure that the proper individuals receive the compensation to which they are entitled. The cost, complications and inefficiencies even for large advertisers and agencies would be enormous. For small advertisers and agencies, many of them without even the manpower, much less the expertise, to deal with the attendant issues, these problems would be truly insurmountable.

To repeat, a single central clearing house or blanket license, which now exists but which would be banned by S.698, is more efficient and economical by far.

I can tell you that if the proposed legislation became law and the current blanket license system disappeared, Procter & Gamble and its advertising agencies would be extremely reluctant to set up the internal organization needed to properly track and monitor this activity, and that the probable bottom-line result is that we would simply use less music than at present, resulting, of course, in less employment and less income for composers and publishers.

I can also tell you that if composers and publishers attempt to recover lost blanket licensing income for music performance rights in commercials and programs, as inevitably they will, advertisers will be asked to bear the cost. If we were to accept this cost, it would have to be passed along to the public, like any unproductive cost, in the form of higher prices.

If advertisers elected not to assume this cost burden, we would, again, simply not use music, use less of it, or use more stock music or music which is in the public domain — and, again, the income of composers and publishers from this source (the broadcast industry) would be reduced. In our opinion, if music becomes more difficult and expensive to obtain and use, advertisers and programmers will follow rational economic behavior and avoid the hassle and cost to the degree possible.

A new problem: S.698 also doesn't adequately address the problem created by existing commercials or programs. In the case of commercials, there are probably 100,000 or more of them in use in the United States at present. While many have a relatively short life, many other commercials and campaigns, which make important use of music, have a very long life. These commercials and the music they contain were developed in good faith under the current arrangements. If, in a given case, we can identify and locate the composer and publisher, there is no assurance we can come to terms on a fair price. In this situation, the advertiser is in a poor bargaining position when a commercial costing over $100,000 or an entire advertising campaign built around a specific tune can be held hostage to unreasonable demands. For instance, in the case of Owens-Corning Fiberglas' seven-year association with the Pink Panther character and theme, there is simply no acceptable option. Like Owens-Corning, many advertisers have entered into long-term contracts and purchased only the synchronization rights on the assumption that performance rights would be covered by a court-approved 40-year old industry system. In these cases, a publisher could withhold permission to perform that music in a dispute over its fair value in already-produced commercials, and this could have a devastating effect on an advertiser company. To offer an analogy, imagine your bargaining position if you woke up tomorrow and discovered the elevators in your highrise building were controlled by someone else. Before construction, you negotiate; afterwards, you may have to pay whatever they demand.

The failure of the proposed legislation to recognize music already integrated with film or tape in programs could also profoundly affect advertisers. It is estimated there are at least some 10,000 series and 25,000 features available and contracted to 1300 local TV stations. This enormous, existing inventory is the backbone of the broadcast business, and its use would be affected by the proposed legislation for many years to come.

As one example, consider the effect of this legislation on barter syndication. This is a new form of program distribution which has become a significant factor in our business in the last few years and is approaching the volume of a major network in revenues. Barter involves a distributor or advertiser funding distribution of existing programs or new program production, trading the program to local stations with a portion of the commercial time, perhaps one-half, already devoted to advertising. The stations get the program free and sell the unsold one-half of the commercial time to advertisers, local or national, who want to participate.

This form of syndicated programming has enhanced competition in the national and local advertising market, strengthened independent stations, and brought more excellent programs to the public. When the highly acclaimed show, FAME, a very uplifting teen-oriented program set in a metropolitan high school, was cancelled by one of the networks, the producer turned to national advertisers and barter syndication to obtain the funds necessary to continue in production. This pattern has been followed by several other top-flight network programs and wholesome, quality original work like SMALL WONDER. Should this bill pass, the current inventory of these programs will require after-the-fact negotiation of performance rights with composers and publishers, if they can be identified and located. In the process, the owner or distributor of the program, either an advertiser or a syndication firm, is at a grave negotiating disadvantage — particularly if it is contractually committed to deliver these programs to local broadcasters ... the same local broadcasters who are supporting this legislation.

Let me describe one such dilemma which will confront Procter & Gamble if this legislation becomes law.

In an effort to enhance our advertising options, P&G obtained the rights to distribute a package of 193 movies for 15 years beginning in July, 1986, including well known titles like KIDNAPPED, THE MIRACLE WORKER, and ELEANOR AND FRANKLIN. These movies were produced by dozens of different studios. The original producers purchased synchronization rights from the composers and publishers for the hundreds of tunes in these 300+ hours of programming, but in most cases did not acquire performance rights. We have now contracted to provide this movie package to stations in 105 television markets (about 70% of the U.S.) for their use over the next 3-1/2 years, in return for a small proportion of the potential advertising time, perhaps 15%. In addition, we control rights to this movie package for 10 more years and plan to license the movies in additional 5-year segments to at least as many stations as currently have rights to the package.

As the distribution rights to these movies have passed to us for this 15-year period, P&G could, if S.698 became law, be held responsible for somehow acquiring the performing rights to all the movies in this package. We contracted for this programming and placed it with stations with the good faith expectation that broadcasters' blanket licenses would provide for the necessary performing rights and ensure that composers and publishers would be properly compensated.

Suddenly, with this legislation, we would be faced with determining the identity of the composers and publishers whose work is included in all 193 movies, probably 250 to 300 separate parties; locating them; negotiating for performing rights; and either paying large lump sums or setting up a per-use monitoring and payment system able to handle the massive amount of tracking and bookkeeping. Accomplishing this task would be horrendously difficult, costly and time-consuming ... perhaps impossible in some cases. The effect would be to place in jeopardy a multi-million dollar investment P&G currently has in these movies!

Note, too, that because we control the distribution rights for these films for 15 years, Procter & Gamble would have the burden of going through this agonizing process, even though 85% of the commercial occasions in these movies would be purchased and used by other advertisers, not P&G.

To make matters more complicated, we are contractually committed to distribute these films, and we are now contractually obligated to provide them to local stations for several years. If this legislation were enacted, we couldn't do either without violating the copyright laws. Even assuming the task described above is do-able, P&G and these local stations would be deprived of the right to use these assets while the search and the negotiation described above was going on.

Apart from the hardships described above, I believe there is an element of fairness to be considered here. As I mentioned earlier, advertisers are the primary, if not sole, source of local station revenues and, therefore, are already providing revenues to more than cover the blanket license fees and all other costs of the local station industry — so long as it's profitable, which I don't believe is in dispute. Why is it wise or appropriate for Congress to remove a part of the stations' cost base and transfer it to those who are already paying the bills? Why should you mandate transfer of this responsibility to program suppliers who presumably will simply add these costs into program prices? Why should Congress force an entire industry to raise its costs by putting a lot of bookkeepers and auditors on the payroll to trace and record music usage? In the final analysis it will be the general public who will bear these costs.

Speaking of fairness, a question has been asked whether we consider it fair for a local station using very little music in its programming format to pay the same blanket license fee as a station that makes heavy use of music. First, we don't believe this should be an issue for commercial television stations, all of whom use music to about the same extent. Moreover, whatever that cost, it is built into each station's cost of doing business and its resulting rate structure, and that cost is — both now and in the foreseeable future — borne by the advertiser who uses that station to air his commercials. Since virtually all stations are affected in the same way and to the same degree by blanket licensing agreements, there is no way one station should be disadvantaged vs. another under the current system. If an individual station is facing difficult economic times, we respectfully suggest that that station's problem probably lies in its overall programming costs or in the quality and consumer appeal of the program material they have chosen to air, not in the cost of a music licensing fee borne on an equal basis by all stations ... they and their competitors alike.

Finally, I have seen and been a party to countless occasions in my business when people of goodwill have bargained and negotiated problems and their differences to a satisfactory conclusion. I know this process can work. I am also aware that it is

BEST AVAILABLE COPY

possible now to seek court review of at least some of the rates which this legislation would affect.

Given these things, it is inconceivable to me that this issue and this business problem needs or deserves Federal legislation and the time and attention of the highest, most important legislative body in the land -- especially when such intervention would run the risk of totally disrupting a 40-year pattern of behavior and practice, affecting a major industry and as many different groups as this one does.

I hope this perspective and the above thoughts will be helpful. Thank you again for this opportunity to be heard.

Senator DeConcini. I'm going to leave the record open for 3 weeks for such additional statements. I do have some questions I'll submit to you, but let me ask Mr. Cotton a question.

Mr. Cotton, you make a pitch that this is fair to everybody.

Mr. Cotton. Yes, sir.

Senator DeConcini. How do you explain the fairness to the broadcasters who have to pay a blanket license for 10 shows where only 2 of them use music based on their revenues, except recently we found out that that's been set aside, but that's been the process? What's fair about that?

Mr. Cotton. Well, it's a cost of their doing business, sir. The advertisers in 1986 paid the broadcasters almost $30 billion in media costs. We honestly feel that we are delivering to them the materials for them to broadcast on their stations. We are giving them all of their production material. We are paying for everything that they are broadcasting. Without our support, certainly most of them would be public service stations; there wouldn't be any advertising at all.

We feel that this is a profitable operation for them and that is probably the most equitable one for all concerned.

Senator DeConcini. Do you think that's fair as far as it relates to broadcasters?

Mr. Cotton. Oh, I do, sir.

Senator DeConcini. Let me ask you a little bit about the advertising—the relationship between advertising agencies and the advertiser. Who actually develops the advertising?

Mr. Cotton. The advertising agencies develop it.

Senator DeConcini. Who pays the directors, actors, and the crews?

Mr. Cotton. The advertising agencies pay all of the fees.

Senator DeConcini. Who selects and pays for the music?

Mr. Cotton. The advertising agencies select all of this.

Senator DeConcini. You have a blanket license?

Mr. Cotton. No, sir, we have no licenses whatsoever. As a matter of fact, if there is any music that we want to use in commercials, we will normally go to the publisher and obtain a license for that specific use.

Senator DeConcini. You get a source license then?

Mr. COTTON. We get source licensing in that particular situation. More often than not, we will obtain a license for the synchronization of the music. That's the only license that we're purchasing at that time—just to synchronize the music to the commercials.

Senator DECONCINI. You don't go and contract with a publisher or a songwriter for music?

Mr. COTTON. Only to put the music in the commercial.

Senator DECONCINI. I see, but not for the actual music?

Mr. COTTON. We are obtaining a license to put it in——

Senator DECONCINI. Just for that performance?

Mr. COTTON. Yes, sir.

Senator DECONCINI. Who would be required under S. 698 to acquire the performance rights to the music to be used in an advertisement? Mr. Wehling or Mr. Cotton?

Mr. COTTON. It would be our responsibility.

Senator DECONCINI. You would have to do it; right?

Mr. COTTON. For the synchronization rights, not for the performing rights.

Senator DECONCINI. Well, the advertising agency would have to do that?

Mr. COTTON. Yes, we are doing that on behalf of the advertiser.

Senator DECONCINI. OK. Can you give me an example of an ad that I might be familiar with that you believe would have been impossible to have if S. 698 were in effect today?

Mr. WEHLING. We have a couple of commercials on the air right now. One is a commercial for Bounce fabric softener which uses a piece of music called "Jump," for which, I might add, this year we're paying $200,000 for the synchronization rights alone. If we had——

Senator DECONCINI. Who do you pay that $200,000 to?

Mr. WEHLING. We pay that to the publisher and composer.

Senator DECONCINI. To the publisher directly?

Mr. WEHLING. Yes, sir.

And if we had to pay separately for the performance rights under this bill, it would significantly add to our administrative burdens and our costs. As I said before, unless the broadcasters reduce their rates, we are the ones ultimately that would be paying double for the time of our commercials.

Mr. COTTON. If I may add one point right here, Senator—we have a list of approximately 332 compositions that have been used over the past 3 or 4 years. All of these are copyrighted compositions. They were not originally created for commercials. They are music that's out there that was written for other uses that has been adapted for commercials. We would be more than happy to also submit this as part of the evidence toward our case.

Senator DECONCINI. That would be fine.

I have a number of other questions, but, unfortunately, we have to bring these hearings to a conclusion. We will submit some questions to you.

[Questions and answers, subsequently received for the record, follow:]

American Association of Advertising Agencies Inc., 1899 L Street N.W., Washington, D.C. 20036 • (202) 331-7345

December 18, 1987

Senator Dennis DeConcini
Chairman
Subcommittee on Patents,
Copyrights and Trademarks
Committee on the Judiciary
328 Senate Hart Office Building
Washington, D.C. 20510-6275

Re: Syndicated Television Music Copyright Reform Act
(S. 698)

Dear Senator DeConcini,

Attached please find responses to the supplemental questions addressed to the advertising panel during the music licensing hearing on November 10, and in your letter dated November 24 to Mr. William C. Cotton, who testified on behalf of the American Association of Advertisng Agencies. The answers to the questions were prepared by Mr. Cotton and by Mr Robert Wehling, who testified on behalf of the Association of National Advertising.

An additional question from Sen. Thurmond was sent in a letter to Mr. Cotton dated December 7. Mr. Cotton's response to that question, plus a list of 280 songs that have been used in advertising, are also enclosed.

Sincerely,

John O'Toole

John O'Toole
Executive Vice President

cc: William Cotton Wells, Rich, Greene, Inc.
Robert Wehling Proctor & Gamble

attachment

JOT/das

AAAA

Answers to Questions From Chairman DeConcini Addressed to the Advertising Panel
(Mr. William Cotton, American Association of Advertising Agencies and Mr. Robert Wehling, Association of National Advertisers)

1. Question: Who actually develops the advertising?

   Answer: In the normal working relationship between an advertiser and an agency, the two parties will agree in advance on a copy strategy or a statement of the objectives for a piece of advertising. At that point, the agency will develop the advertising. For a television commercial, this will usually take the form of a script or storyboard, noting the words to be spoken (or sung) and describing or illustrating the visual content planned for the commercial plus what use, if any, will be made of music. The script or storyboard will be submitted to the advertiser for approval before production begins.

2. Question: Who pays the directors, actors and crew?

   Answer: All of these costs are eventually paid by the advertiser. In actual practice, the actors are normally hired and paid by the agency, while the director and crew are hired and paid by the production company selected to shoot the commercial.

   The cost of people hired by the production company (including the director and the crew), plus all other cost of producing the commercial, are billed by that production company to the agency. The agency, in turn, will bill this production company cost to the advertiser, along with the cost of the actors which they (the agency) paid initially.

   The agency's bill to the advertiser will include commission (or fee) earned by the agency on the cost of the total job, production and talent.

3. Question: Who selects and pays for music?

   Answer: The music used in a given commercial is normally a part of the agency's creative recommendation made to the advertiser. If music is recommended, the agency would indicate whether they want an original tune written or whether they want to use a specific, exisiting composition.

   If the use of music is recommended and approved, the agency would normally negotiate with the composer or publisher to acquire synchronization rights for the music. The cost would initially be paid for by the agency and eventually billed to the advertiser (plus commission or fee), as noted above. The performance rights would be paid by the broadcasters; that cost would be passed back to the advertiser in the price they pay for media time.

4. Question: Who would be required under S.698 to acquire the performance rights to the music to be used in an advertisement...the advertiser or the agency?

   Answer: Under S.698, the agency would normally be expected to undertake the negotiation needed to acquire the performance rights to the music to be used in a commercial or advertising campaign. The cost of these performance rights would ultimately be the advertiser's responsibility.

Note: As pointed out in earlier testimony, in the case of a small agency, the experience and expertise needed to grapple with the issues involved in acquiring these rights may simply not be present.

5. Question: Can you give me an example of an ad that I might be familiar with, that you believe would have been impossibe to run if S.698 had been enacted?

Answer: It's not clear that S.698 would have made it literally impossible to run any specific commercial or campaign. The problem is not feasibility as much as it is problems related to the time and effort required, the cost, and the difficulty of settling on a fair and reasonable price to be paid for something the value of which, in most cases, simply cannot be foreesen accurately by either part at the time the negotiation would have taken place. Who can say if the California Raisin Advisory Board would have been able to use "I Heard It Through The Grapevine", in their dancing raisin commercials? Or if the Citizen Watch Company would have been able to use the old Al Jolson Song "About A Quarter To Nine" in their advertising? Given these problems, it's possible that a number of current commercials might not have been run.

Mr. Wehling has commented on this point in his expanded testimony, being submitted separately. Here is what he said:

"Some (commercials) have a musical track from start to finish, and others use music only for punctuation. Sometimes, the very same song can be used prominently on one commercial and simply as a brief closing "button" in another commercial. Moreover, and more importantly, at the time of the initial contact between an advertiser or its agency and the composer or publisher, we often don't know if the commercial in which the music will appear will be used once for a copy test or result in an ongoing campaign. If it passes the copy test hurdle, it may be used in a test market in perhaps 1 to 5% of the U.S., or nationally. It may be used in a single commercial or in a pool of 6 or 7 commercials. It may last 6 months or remain on the air for 10 or more years. And, of course, there is no way for either party to know with any degree of certainty how much exposure--how large an advertising budget--it will get.

The point, of all this is, that neither the program producer nor the advertiser are in a position to commit a sizeable sum of money, upfront, for music performance rights in the face of such uncertainty. Nor can a composer properly value his creation given these same uncertainties.

The alternative, of course, is some sort of payment per use--which, lo and behold, is essentially the kind of monitoring and tracking and compensation functions for which the licensing organizations (BMI, ASCAP and SESAC) and for which the blanket licensing system were created. Only by such a system can the creators of a piece of music receive what is just and fair for their creative efforts.

In the area of commercials, source licensing will force this function on thousands of individual advertisers and their agencies. The administrative burden which will result will be substantial."

Going back to the original question: It would, of course, be possible if S.698 became law, that a composer or publisher, unsure of the true value of his work because of the variables noted above, could demand an exorbitant fee for the performance rights, which the agency and advertiser might simply refuse to pay. At that point, a commercial or a campaign using music that might have run, would never see the light of day.

6. Questions: In the case of an ad like the Nike ads which used Beatles music, why couldn't the performance rights to the music have been acquired at the same time the synchronization rights were obtained?

Answer: Theoretically, the performance rights could have been acquired at the same time the synchronization rights were obtained. The difficulty (impossibility?) of doing so would have been as described above. Beyond this, because the Beatles have been such an extremely popular group in the music business, the asking price for performance rights, over and above the synchronization rights could, well have been exorbitant and beyond the budget of the Nike people--in which case, the entire deal could have broken down.

Wells, Rich, Greene, Inc. / 9 West 57th Street at 5th Avenue / New York, N.Y. 10019

Answer to Question from Senator Strom Thurmond addressed to William Cotton, American Association of Advertising Agencies.

Question: You testified that passage of S. 698 could cost advertisers as much as $150 million each year. All other witnesses, proponents as well as opponents, agreed that local television broadcasters' total performing rights payments to ASCAP and BMI in 1986 were approximately $100 million. Broadcasters asserted that only about $3 million of this total went for clearance of music in commercials. On what basis can you justify the assertion that what not costs $3 million will cost $150 million if source licensing legislation is passed?

Answer: Since the introduction of S.1980 (99thCongress) and the current S.698, advertising agencies have been questioned by publishers when the agencies were negotiating for the synchronization rights to compositions as to tha mounts to be paid to the publishers for the performance rights upon passage of the legislation. Since this is an area that had not been negotiated in the past because it was already covered by the payments made to the publishers and composers by the performance societies, the parties were unsure of what rates to use.

Some publishers proposed a formula that would compensate them for the lost performance rights based on the cost of the media or air time purchased for the commercials. They felt that that the appropriate rate should be a fee equal to one percent of the media costs for the commercials.

In testimony, we stated that "radio, syndicated and nonsyndicated local television, and network television form a highly integrated entity called American Broadcasting. We feel that a change in the manner of performance rights payments for local syndicated television music...will seep into all other parts of broadcasting in this country.'

ASCAP indicates that they alone have paid out over $3 million in 1986 for local stations use of commercial music. BMI and SEASAC's payments would have to be added to this. The broadcasters assertion that this figure covers both ASCAP and BMI may not be correct and in no way covers tht total paid to the publishers and composers for the performan of commercial music on both radio, local televison and network televiso use.

If the one percent formula were to become the industry standard for performance rights, each advertising agency would have to verify exactly where and when the commercials with the music actuall ran, the value of the media cost for each spot, and issue a periodic payment to the publisher and composer - almost what is currently done by ASCAP and BMI.

In the May 18, 1987 issue of Advertising Age, a major trade publication, it was reported that during 1986 approximately $30 billion was paid to the broadcasting media for advertising. This includes all radio and televison stations and networks in the country. If only one half of all commercials used music, then based on the one percent formula, this legislation could cost the advertising industry as much as $150 million each year. This is in addition to the fees paid to the publishers for the synchronization rights to the compositions.

PRODUCT	TITLE
501 Jeans	Coyotes 501 Blues
Anchor Hocking	Shoop Shoop Song
Anhueser Busch	To Live and Die in L.A.
Big Boy Rest./Chicken & Rib	Surfin USA
Blue Jeans	Sensation
Broadcast Business Consultant	Happy Happy Birthday Baby
Bubble Yum	Time Flies
Bubble Yum	Yum It Up
Cadillac	Lincoln
Cadillac	Tax Advantage
California Cooler	Louie, Louie
Central Fidelity Bank	What A Difference A Day Makes
Chic Jeans	Natural Woman
Chicagoland Chevy	Junk Yard Dogs
Coca Cola	Desert Island
Coca Cola	Horizantal Pour
Coca Cola	Max Truck
College Marketing	Do It Right
College Marketing	Small College/Big Difference
Dash Detergent	Do You Believe In Magic
Downs At Santa Fe	Da Do Ron Ron
GM Auto Trucks	Victory Motors
Goodyear Tire & Rubber	Goodyear Take Me Home
Group Health Co-op	Good Lovin
Hi C Juice	Who Put The Bomp
Home Box Office	HBO Year to Watch
Honda Scooters	Who Do You Love
Hospital Services	That's What Friends Are For
Houston Coca Cola Bottlers	Surfin USA
Kingdom of Video Sales/Rental	Kingdom of Video
L.A. Gear	Fun Is Here
L.A. Gear	You've Got The Moves
Michael Reese Health	I Got You, I Feel Good
Mother Butler's Pies	Goin Out Of My Head
Mutual Savings	Happy Happy Birthday Baby
Parker Brothers	Monster Mash
Pepsi Cola	Float
Pepsi Cola	Mountain Dew
Portland Press Herald	What A Difference
Pringles Chips	Butter 'N Herbs
Quaker Oats/Kibbles	Boney Maroney

PRODUCT	TITLE
Rainer Bank	Dream Lover
Ranier Bank	Daydream
Regis Hair Styles	There'll Be Some Changes Made
Robeson Fans	Summer in the City
Rolets Foods (English Version)	Rolets
Rolets Foods (Spanish Version)	Estamos Defiesa
Royal Mints	Seduced
Sears Portrait Studios	Baby You've Never Looked Better
Skimmers	Pond
Stroh's Beer	Imagine
Swanson/Baseball/Dog & Cat/Men	Home Cookin
Tri State Chevrolet	Surfin USA
Ultra Swim Shampoo	Summertime Blues
USF&G Insurance	Across America
WFTS TV	Summertime Blues
	Cara Mia
	Jeepers Creepers
	Good Day Sunshine
	Devil With a Blue Dress On
	You Are So Beautiful
	Heat Wave
	Surfin' Safari
	Get Ready
	Do You Wanna Dance
	Searchin
	Who Can I Turn To (When Nobody Needs Me)
	Just The Two of Us
	Hot Stuff
	Hi-Heel Sneakers
	Tutti Frutti
Royal Crown Cola/Diet RC	All The Tired Horses
Royal Crown Cola	Antartica
Procter & Gamble/Luvs Diapers	Baby Face
Blue Bell/Wrangler Jeans	City of New Orleans
Cadbury USA/Almond Joy	Joy To The World
Toyota Motor Sales	Kansas City
Toyota Motor Sales	I Got Rhythm
Toyota Motor Sales	It's So Easy
Wendy's	Only You
Kenner/Fluppy Dogs	Puppy Love
Toyota Motor Sales/MR2	Route 66
S&W Fine Foods Mesquite Charcoal	The Great Pretender
Toyota Motor Slaes	This Joint is Jumping

PRODUCT	TITLE
Burger King	Takin' Care of Business
Burger King	Ain't Nothin' Like the Real Thing
Demet's	Character Study
Emery	9 to 5
Ford	Age of Aquarius
Ford	Peter Gunn
Ford	Calipso Fred
Ford	Short People
Ford	Roll on Down the Highway
Kellogg	Dedicated to the One I Love
Kraft	New York, New York
Lever	Get Closer
Lever	Splish Splash
Miller	American Made
Nestles	Chantilly Lace
Quaker	Happy Days are Here Again
Quaker	Bread and Butter
Quaker	Bony Moronie
Quaker	At the Hop
Quaker	Barbara Ann
Oscar Mayer	Hello Dolly
Scott	Pennies from Heaven
Scott	Let the Good Times Roll
Scott	I Got You I Feel Good
Showtime	I'm So Excited
Six Flags	Shout
Warner Lambert	Feel A Whole Lot Better
Burger King	BKT/Directions
Nestle's/Semi Sweet	Kids
Oscar Mayer	Coach It
Oscar Mayer	Big Oven
Emery	Secretaries
Miller	Anthem II-My Baby's American Made
Scott**	Good Times Roll**

** Waiting for Approval

PRODUCT	TITLE
Lincoln/Mercury	Ain't No Mountain High Enough
Lincoln/Mercury	Born To Be Wild
Lincoln/Mercury	Help!
	Hot Stuff
	Let Your Love Flow
GTE Sprint	I Just Called To Say I Love You
	Peanut Butter
Lincoln/Mercury	Proud Mary
	Reelin'and Rockin'
Honda	Walk On The Wild Side
	Why Do Fools Fall In Love
Lincoln/Mercury	You Are So Beautiful
	Nice 'N Easy
	Come Fly With Me
	Heat Wave
Chevrolet	Lean On Me
	Over There
	It's My Turn
	Momma Said There'd Be Days Like This
	Wouldn't It Be Nice
Sunkist	Good Vibrations
Chrysler	Expressway To Your Heart
AMEX	Windmills Of Your Mind
Lincoln/Mercury	Get Ready
Subaru	You Always Hurt The One You Love
Moet & Chandon	I Only Have Eyes For You
	Thank God I'm A Country Boy
Proctor & Gamble	Put On Your Red Shirt Mama
Proctor & Gamble	You Do Something To Me
Volvo	Through The Years
Lincoln/Mercury	Do You Wanna Dance
Woolite	You Make Me Feel Brand New
	Momma Told Me Not To Come
	Louie, Louie
	Love Child

TITLE

- Ain't She Sweet
- Ain't We Got Fun
- Am I Blue
- Anything Goes
- As Time Goes By
- Bei Mir Bist Du Shoen
- Brother Can You Spare A Dime
- California Here I Come
- Can You Feel It
- Carolina in the Morning
- Chariots of Fire
- Da Doo Ron Ron
- Dream Weaver
- Drink, Drink, Drink
- Embraceable You
- Everyday People
- Expressway to Your Heart
- Happy Days Are Here Again
- Happy Feet
- Eymne
- L'Enfant
- I Found A Million Dollar Baby
- I Got Rhythm
- I'm Just Wild About Harry
- I'm Looking Over A 4 Leaf Clover
- I Wanna Be Loved By You
- Java Jive
- La Vie En Rose
- Memo To My Son
- Monkey Time
- Oh You Beautiful Doll
- Seduced
- She's Just My Style
- Somebody Loves Me
- Star Wars Theme
  - Imperial March
  - Ewok Celebration
- Summertime Blues
- Superman (Theme)
- Take This Job And Shove It
- Teddy Bear's Picnic
- The More I See You
- Too Marvelous For Words
- We Are Family
- We're in the Money
- Winter Wonderland
- Yes We Can Can

TITLE

You Do Something To Me
You Go To My Head
You Ought To Be In Pictures
You're an Old Smoothie
You're My Everything
You're Sixteen

****

SONG TITLE

A FOGGY DAY
ALL I NEED IS A MIRACLE
ALL SHOOK UP
ANYTIME (3x)
APRIL IN PORTUGAL
AT THE HOP
BAD IS BAD
BLUEBERRY HILL (4x)
BLUE SUEDE SHOES (2x)
BOUQUET OF ROSES
BREATHLESS (2x)
BUTTON UP YOUR OVERCOAT (6x)
COME A LITTLE BIT CLOSER
COMEDY TONIGHT
COOL WATER
DANGER AHEAD (2x)
DAYTON, OHIO 1903
DID YOU EVER SEE A DREAM WALKING
DOCTOR'S ORDERS
DON'T BE CRUEL
DRAGNET MARCH
EVERYBODY HAVE FUN TONIGHT
EVERYBODY OUGHT TO HAVE A MAID
EVERYTHING SHE WANTS
FIVE HUNDRED MILES
FRIENDSHIP
FROM THIS MOMENT ON
GEORGY GIRL
GETTING TO KNOW YOU
GOOD MORNING
GREAT BALLS OF FIRE
GREAT DAY
GREEN ONIONS
HAVE YOU SEEN HER
HEARTBROKEN
HELLO MARYLOU
HEY GOOD LOOKING
HOT STUFF

SONG TITLE

I DON'T HURT ANYMORE
I DON'T WANT TO SET THE WORLD ON FIRE
I REMEMBER IT WELL
I WANNA BE BAD
I'LL BE SEEING YOU
I'M BEGINNING TO SEE THE LIGHT
I'M GONNA MAKE YOU LOVE ME
I'M GONNA WASH THAT GREY RIGHT OUTTA MY HAIR
IN MUNCHEN STEHT EIN HUFBRAUCHAUS
IN MY EYES
IT'S MY PARTY
IT'S MY TURN
IT WAS A VERY GOOD YEAR
I'VE BEEN EVERYWHERE
JAMBALAYA
JUST IN TIME
LEMON TREE
LET IT RAIN
LET IT SNOW
LET ME BE YOUR TEDDY BEAR
LET ME ENTERTAIN YOU
LET'S CALL THE WHOLE THING OFF
LIPSTICK ON YOUR COLLAR
LOVE ME TENDER
LOVE'S THEME
MA CURLY HEADED BABBY
MAKE SOMEONE HAPPY
MILORD
MONSTER MASH
MOONLIGHT LADY
MORNING TRAIN
MY FAVORITE THINGS
MY FUNNY VALENTINE
NATIVE NEW YORKER
NIGHTSHIFT
OUR LOVE IS HERE TO STAY

Senator DeConcini. Thank you, gentlemen, very much.

Mr. Cotton. Thank you, sir.

Senator DeConcini. The record will remain open for 3 weeks for anybody who wants to supplement their statements.

Thank you very much.

[Whereupon, at 1:04 p.m., the subcommittee recessed, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

National Music Publishers' Association • Inc.
and The Harry Fox Agency, Inc.

EDWARD P. MURPHY, *President*
Chief Executive Officer

STATEMENT OF THE
NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.

IN OPPOSITION TO S.698

Subcommittee on Patents,
Copyrights and Trademarks
Committee on the Judiciary
United States Senate

For the Hearing Record
November 10, 1987

CABLE ADDRESS: HAFOX
TELEX: 237441 HAFOX UR
• 205 EAST 42 STREET, NEW YORK, N.Y. 10017 • (212) 370-5330

The National Music Publishers' Association, Inc. ("NMPA"), a trade association representing more than 300 United States businesses that own, protect, and administer copyright in musical works, urges members of the Subcommittee on Patents, Copyrights and Trademarks to oppose S. 698.

S. 698 would amend the Copyright Act in an effort to dismantle the "blanket licensing" system used for almost two generations by music creators and copyright owners throughout the world to authorize others to perform their works. However, it is not music creators and rights owners who seek this change in the law. Rather, the bill's proponents are profitable local television stations that need the music performance right in order to broadcast syndicated non-network programs containing musical works.

S. 698 is special-interest legislation that should be rejected because it would:

- eliminate existing marketplace options for licensing music performance rights;
- tear down a fair and efficient licensing system that has operated effectively in the United States and throughout the world for forty years; and
- preempt effective, non-legislative, means of addressing the broadcasters' concerns; and
- serve no public policy.

A. Music Performance Rights Licensing Today

United States copyright law rewards creativity and promotes public access to creative works by granting authors certain exclusive rights during the copyright term. Among these rights are the right to reproduce a work, and the right to perform it publicly. Today, when music is used to enhance a television program, the show's producer or syndicator obtains from the copyright holder a license for the "synchronization" right, a variant of the reproduction right; this license authorizes the producer to integrate the music with the action on the screen. In order to broadcast that music, a television station secures a separate license authorizing its public performance.

With respect to copyrighted music, the public performance right is the most valuable exclusive right -- it represents continued payment for continued use of a work. It is also the most difficult right to police and enforce. Music can be performed so extensively that it is impossible for an individual to monitor every conceivable use. Consequently, virtually all composers and music publishers enlist the aid of one of the "performing rights societies" to serve as non-exclusive administrator of performance rights. The leading performing rights societies in the U.S. are the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and SESAC, Inc.

(formerly the Society of European Stage Authors and Composers).

In exchange for a negotiated fee, the reasonableness of which is subject to federal court review, the societies issue a "blanket" license which accords a local television station unrestricted access to any and all of the musical works in that society's repertory. The license fees collected by the societies are distributed to those composers and music publishers whose works are actually performed, based upon a formula which takes into account the frequency of performance and the nature of the use.

The essential role of performing rights societies and the merits of the blanket licensing system were described by the Supreme Court in Columbia Broadcasting System v. ASCAP:[1/]

> Since 1897, the copyright laws have vested in the owner of a copyrighted musical composition the exclusive right to perform the work publicly for profit, but the legal right is not self-enforcing. In 1914, Victor Herbert and a handful of other composers organized ASCAP because those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that as a practical matter it was impossible for many individual copyright owners to negotiate with and license the users and to detect unauthorized uses.

[1/] 441 U.S. 1 (1979), at 4-5 (footnote omitted).

For the reasons identified by the Court -- the impracticality of individual negotiation and the near impossibility of individual enforcement -- performing rights societies today exist in virtually every nation which respects copyright.

The blanket license issued by the performing rights societies is by far the predominant method of performance rights licensing. However, alternative methods are available. These are: the "per program license," a modified version of the blanket license which covers only those programs accompanied by works in a society's repertory; the "direct license" negotiated between the music copyright owner and the TV station for the use of a particular work; and the "source license" under which the producer of a syndicated program obtains the music performance rights for a particular work on behalf of the local station.

B. The Proposed Legislation

S. 698 would amend the Copyright Act to make it unlawful for a producer/syndicator to convey the right to broadcast his program on non-network television without also conveying the performance rights to all accompanying copyrighted music. In other words, the bill would eliminate other existing licensing options, including the blanket license, and mandate source licensing as the sole method for conveying performance rights to music used in syndicated non-network programs. The effect of the legislation would be to pass the cost of television music from the local stations to shows' producers. Thus, the value of the important performance right -- set in negotiations with the producer/syndicator who does not need this right, rather than with the broadcaster who does -- would be eroded.

In an attempt to create the illusion of fairness to the creative forces in the music business, S. 698 recites a statutory "right" of songwriters to receive residuals in the form of a share of the compensation received by the producer/syndicator for the right to broadcast his program. Presumably to aid songwriters in attaining an equitable share, a similar House measure, H.R. 1195, includes a provision that would enable songwriters whose works qualify as "works made for hire" under the copyright law to form a guild or union (in essence using an amendment to the Copyright Act to classify such persons as "employees" for purposes of the labor laws). Senate sponsors, sensitive to the questions this provision raises with respect to state "right-to-work" laws, have deleted the union provision from S. 698. Neither version, however, illuminates how the vast majority of songwriters who would not qualify as "employees" would be assured fair compensation, nor explains how the interests of the spouses and children of deceased songwriters, of songwriters who live abroad, and of music publishers who own and promote copyrights would be protected.

C. Legislative Intervention Is Not Warranted

1. Source Licensing Is An Available Marketplace Option

S. 698 would elevate source licensing as the sole method for conveying music performance rights to local television stations. But the local stations do not need special legislation in order to obtain a source license: source licensing is already an alternative to the blanket licensing system.

In Buffalo Broadcasting Co., Inc. v. ASCAP,[2] the U.S. Court of Appeals for the Second Circuit rejected an antitrust challenge to the blanket license system, finding that the local stations had failed to show that per program, direct, and source licenses are not reasonably available marketplace alternatives. In fact, the Court of Appeals observed that the local stations had made no attempt to obtain performance rights by source licensing prior to bringing their lawsuit. In uncharacteristically strong language, the court recounted instances in which, well into the litigation, the local stations had sought to "negotiate" source licenses with television producers/syndicators without ever tendering "the customary indicator of a buyer's seriousness in attempting to make a purchase -- an offer of a sum of money."[3/]

---

[2] 744 F.2d 914 (2d Cir. 1984) (reversing 546 F. Supp. 274 (S.D.N.Y. 1982)), cert. denied, 105 S. Ct. 1181 (1985).

By eliminating all other options, S. 698 would force copyright owners into a single way of licensing their property. Not surprisingly, the source licensing method lauded by the local stations would pass the cost of publicly performing television music to producers/syndicators, at the expense of songwriters and their music publishers. By mandating source licensing, S. 698 does not ensure that music performance rights will continue to be licensed at reasonable rates; it merely relieves extremely profitable local stations of the obligation to pay for the music they perform.

2. Blanket License Rates Are Reasonable

The broadcasters argue that legislative relief is necessary because the rates they are "forced" to pay for a blanket license are unreasonably high. In fact, these rates are negotiated periodically between equal bargaining partners: the performing rights societies on behalf of

---

[3/] 744 F.2d at 931.

songwriters and music publishers, and the All-Industry Television Station Music License Committee on behalf of the local broadcasters.

The current negotiating mechanism is governed by a consent decree which strikes a delicate and fair balance between copyright and antitrust concerns. This "Amended Final Judgment" renders ASCAP a toothless tiger with regard to the antitrust laws, but preserves its ability to provide services of public utility and significance.4/ It prohibits ASCAP from acquiring exclusive rights and from interfering with the right of any member to issue a non-exclusive performing rights license (e.g., a source or direct license), and requires the society to grant a blanket license to anyone requesting it.

The Amended Final Judgment directs ASCAP and the users of music in its repertory to attempt to negotiate the license fee. If after 60 days the negotiations prove unsuccessful, the user may apply to a federal district court to determine a "reasonable" fee. In such proceedings, ASCAP bears the burden of establishing the reasonableness of the fee requested. While the rate proceeding is pending, either party may ask the court to set an interim fee, which is

---

4/ BMI operates under a similar decree.

subject to retroactive modification upon later determination of the "reasonable" fee.

Under this procedure, the blanket license fees paid by the local stations have steadily declined over time. For example, ASCAP's rates have fallen since 1949 from 2.5 percent of net station revenues to 1.15 percent, little more than a penny on the dollar.

The local stations further argue that blanket license fees are unfair because a portion of the fees collected by the performing rights societies is distributed to songwriters' music publisher-partners. This assertion totally ignores the publisher's vital and creative role in the music business.

It is rare for any song, especially one by a new or developing talent, to achieve popularity through chance exposure alone. Most are brought to the public ear and consciousness through hard work -- the cooperative work of the songwriter and his publisher. Although the role of the songwriter in this partnership is clear, the role of the publisher is less well understood. His contribution takes place outside the spotlight: a music publisher provides the encouragement and financial backing that enables developing artists to concentrate on their craft; he promotes the use of the work in recordings, films, commercial advertisements, and other media; he handles licensing and administers and protects copyright. This collaboration frees the songwriter to create more music, while his music publisher works to promote that music and guards against infringing uses.

The local stations go so far as to assert that, in the case of music publishing companies affiliated with film production studios, the distribution of music performance royalties to the publisher constitutes "double-dipping" -- an additional and unwarranted source of revenue for the broadcast of the studio's program. This claim is without merit. Payment by a local station to a production studio is for the use of the television program, a separate work created independent of any effort on the part of the music publishing arm. The music performance royalties distributed under the blanket license, on the other hand, compensate the songwriter and music publisher for their respective contributions in making the accompanying music available. And ASCAP's records demonstrate that in 1984 and 1985 publishers affiliated with major production studios received less than thirteen percent of the total amount distributed for local television performances.

3. Rate Determination Proceedings Are Pending Before The Courts

ASCAP and the All-Industry Committee have, since September 1986, engaged periodically in private negotiations on blanket and per program license fees; however, no agreement has been reached. Consequently, as is a user's prerogative under the Amended Final Judgment, the local stations have applied to the U.S. District Court for the Southern District of New York to determine a reasonable rate. The proceeding is scheduled to begin on January 19, 1988.[5]

If necessary, the federal court will determine a "reasonable" rate for the blanket and per-program licenses based upon a comprehensive record. Given the availability of non-legislative means for resolving this dispute, the broadcasters call for legislative intervention should be rejected.

4. The Legislation Would Destroy An Effective Global System

Performing rights societies around the globe employ the blanket licensing system. Moreover, these organizations cooperate on a worldwide basis. For example, reciprocal arrangements among some forty societies worldwide give an ASCAP licensee in the U.S. access to the copyrighted works in the foreign societies' repertories. These arrangements also ensure that U.S. songwriters and music publishers receive compensation for the public performance of their works throughout the world -- no small matter given the global popularity of America's music.

---

[5] During the pendency of the local stations' application, ASCAP requested imposition of an interim fee to cover the period April 1, 1985 through March 31, 1988. The interim fee established by the court on February 17, 1987 caps the annual aggregate fee paid by the local stations at $60 million.

Source licensing legislation threatens this fair and efficient system, and our nation's trading partners have taken notice. In July 1986, the Delegation of the Commission of the European Communities and the Embassy of the United Kingdom delivered to the U.S. Department of State a diplomatic message expressing opposition to then-pending source licensing bills. The message emphasized that such legislation runs counter to U.S. obligations under Article IV bis of the Universal Copyright Convention, which ensures the economic interests of authors and rightsholders with regard to public performance of their works by broadcast. It was similarly noted that mandatory source licensing would be incompatible with the spirit, and possibly the letter, of Article XI bis of the Berne Convention for the Protection of Literary and Artistic Works, a convention to which the U.S. Government seeks to adhere.

Most significantly, the communication noted that

> U.S. rightsholders benefit substantially from public performance royalties earned under blanket licensing arrangements established within the Member States of the European Communities . . . . If mandatory source licensing is introduced in the U.S. and applied to works by Community composers, there will be strong calls for compensation by European authors, in particular by

> increasing the share of Community productions in European radio and television broadcasts.

At a time when the U.S. is examining adherence to the Berne Convention and pressing developing and newly industrialized nations to respect copyright, source licensing legislation, which seriously erodes the value of music copyright, should be rejected.

D. Conclusion

S. 698 serves no public policy. In fact, the proposed legislation runs counter to the goals of copyright law: to spark creative genius and to assure the public's access to new works by providing economic incentives for creators and rights owners. S. 698 will not make more music available to the public, nor will it ensure that the creative forces in the music business are compensated fairly. Rather, the measure serves the interests of the powerful and immensely profitable local television stations, the popularity of whose programming is greatly enhanced by the music covered by the blanket license and who pay only about one cent on the dollar for the benefits the license conveys.

Early next year, a federal district court will review the reasonableness of blanket license fees. Nonetheless, the local stations are pressing Congress to intervene and give them an even better deal at the expense of songwriters, their music publishers, and ultimately the music-loving public.

The National Music Publishers' Association respectfully urges the Subcommittee to protect fundamental copyright and free-market principles by firmly rejecting S. 698.

the songwriters guild*

George David Weiss
President

276 Fifth Avenue, New York, N.Y. 10001
(212) 686-6820

November 19, 1987

Senator Dennis DeConcini, Chairman
Subcommittee on Patents, Copyrights
and Trademarks
Committee on the Judiciary
Washington, DC 20510-6275

Dear Senator DeConcini:

Thank you for your letter of November 16, 1987, in which you invited me to submit written testimony regarding songwriter concerns about S.698.

Enclosed is the official position of the Songwriters Guild of America.

My fellow writers join me in expressing gratitude to you for affording us the opportunity to set forth our views for your consideration.

Sincerely,

G. David Weiss

George David Weiss

GDW:lmc
enclosure

serving the American songwriter for over 50 years

NEW YORK LOS ANGELES NASHVILLE

**formerly* American Guild of Authors and Composers

STATEMENT OF THE POSITION
OF THE
SONGWRITERS GUILD OF AMERICA
REGARDING S.698

The Songwriters Guild of America opposes the enactment of S.698 for the following reasons:

1. It would require the performing rights license to be simultaneously conveyed with the synchronization right for music to be used on non-network commercial television.

Section 106 (4) of the 1976 U.S. Copyright Law grants to the owner of the copyright the exclusive right of performance. "Performance" entitles a composer to payment for each use. S.698 does not provide for continued payment for continued use and thereby eviscerates the meaning of the performance right under the 1976 Copyright Law. In what the sponsors believe to be a curative for this denial, they have provided, in a new subsection (f) to Section 4 (section 201, title 17 U.S. Code) that: "the author or authors of such musical work (or in the case of a work made for hire the employer or employees who prepared the work) shall be entitled to an interest in any compensation paid to the owner of the copyright in such motion picture or other audio-visual work. The amount of such interest shall be determined by agreement between the owner of the copyright in the motion picture or other audio-visual work and the author(s) or employee(s) who prepared the work."

The language indicates a surrealistic view of the bargaining power of songwriters in this media resulting in an amendment which would cut off all meaningful income from performance:

(1) Well over 90% of all music written expressly for television is under a "work for hire" contract. The writer surrenders his/her copyright, but expressly retains the right to license the small performing rights through ASCAP, BMI, or SESAC.

(2) The writer-employee is paid a relatively nominal fee for his music/lyrics by the employer-for-hire (i.e. the TV producer of the show)

(3) The proposed statute purports to give the writer "an interest" in any compensation paid to his/her employer - to be determined by negotiation.

Since no union exists to represent such "employees-for-hire" (see paragraph 6 infra); since music is but a small part of any television or other audio-visual film; since virtually all other contributors to the film are represented by unions (e.g. writers, directors, actors, technicians) all of whom have bargained for continued payment for continued use; since there is no obligation under the statute for the non-network commercial station to make any payments to the producer's employees for hire (i.e. songwriters) - the songwriters are without any realistic bargaining power to require their employer to make any meaningful payment.

The rationale for performance payments based on use is that the TV Producer while creating the vehicle for the performance does not involve itself in the act of performance. That only occurs by the non-network showing; hence the obligation for payment rightly rests with the entity that performs (i.e. the local television station).

As the Court of Appeals stated in Buffalo Broadcasting Company, Inc. et al v. ASCAP and BMI et al, local television stations have adequate means available for the licensing of music other than through the blanket license -- which was the object of the plaintiff's antitrust litigation. They are free to deal directly with the performing rights society for a program license or with the producer of a program or the composer via a source or direct license. The Court pointed out that their failure to do so was their own fault and not the fault of the blanket license.

2. To adopt the proposed bill will surely deny songwriters the means to secure fair compensation when their works are performed; and will only enrich those who need no governmental subsidy.

3. Compared to the number of composers in America, which are in the tens of thousands, television stations are owned and operated by some 450 people owning approximately 750 stations; each of which has a virtual monopoly over a given airwave. Thousands of composers compete for a very small share of the pie and are invariably at the mercy of those who use their music.

4. This bill will not benefit the "truly creative talent". No one knows who are the truly creative until their music is heard and performed. This bill is a disincentive to the creative novice, unrepresented and alone, whose one-time payment and the illusory right to bargain with his/her employer for a further "cut of the pie" will drive the creative from the field, leaving it to the less talented. In prior Congressional testimony, claims were made that only 3% of ASCAP members receive 75% of the television revenue. If correct it reflects the fact that the most gifted people are being rewarded. But gifted people must reach that level through trial and error. If they are not compensated, they cannot afford to enter the race. The fact that a small percentage of ASCAP (and BMI) writers receive the lion's share of performing rights proceeds merely reflects a fact of life in all the arts. A handful of novelists, playrights, sculptors, painters, actors and actresses receive the lion's share of the money for those services. Excellence always produces the greatest revenue for the smallest number.

5. The public never benefits where a copyright's price is reduced or when it enters the public domain. The cost of music in any television program or motion picture is infinitesimal compared to its other creative elements. The savings will be made by the television stations, and will not be passed on to the consumer. One only need look at theatrical shows, books, motion pictures and television productions based on public domain works. It costs the public no less to buy a ticket.

6. There is no means outside of ASCAP, BMI, and SESAC to monitor performance over television and there will be no means to do so if S.698 is enacted. No organization exists which can perform that function. The Harry Fox Agency, which has been cited as an example of a clearing house for music and lyrics, does not monitor performance but makes one time synchronization licenses; no union has among its members background scorers and in a decision of the NLRB it was held that background scorers and film writers do not qualify as a union.

7. To have Congress legislate the manner in which music is licensed to local television stations, protects those who do not need protection -- the local television stations,. The sales price for these stations has soared enormously over the past ten years. It is not an endangered industry and needs no help; surely not at the expense of those who are at the lowest end of the totem pole when it comes to renumeration for creative work -- the songwriters.

VLA
VOLUNTEER LAWYERS
FOR THE ARTS

November 24, 1987

The Honorable Dennis DeConcini
Chairman, Senate Judiciary Subcommittee
on Patents, Copyrights and Trademarks
Dirksen Senate Office Building
Washington, D.C. 20510

Re: S. 698

Dear Senator DeConcini:

Volunteer Lawyers for the Arts (VLA) would like to express its opposition to S. 698, the so-called "source licensing" legislation, which would drastically alter the way in which performing rights in copyrighted musical compositions are licensed to television broadcasters.

VLA is a non-profit organization which provides free legal services to individual artists and arts organizations with art-related legal problems. We only serve clients who are otherwise unable to afford legal counsel.

Many of VLA's clients and constituents are composers who have not yet achieved commercial success in their profession. They do not have the resources to negotiate on a level playing field with the broadcasting industry. S. 698 would preclude them from exercising the many options now lawfully available for licensing their copyrighted musical property. Instead, S. 698 would force upon them, as the only option, the method of licensing most favorable to the broadcaster and least favorable to the composer. Such a result would be patently unfair and unjust.

VLA therefore opposes S. 698. We would appreciate it if you would make this letter a part of the record of the Subcommittee's consideration of the bill.

With thanks

Sincerely,

L. Robert Batterman

L. Robert Batterman
Chairman
Board of Directors,
Volunteer Lawyers for the Arts

Timothy S. Jensen

Timothy S. Jensen
Executive Director

1285 Avenue of the Americas, 3rd floor, New York, NY 10019 212/977-9270

AMERICAN BAR ASSOCIATION

Section of Patent, Trademark and Copyright Law
750 North Lake Shore Drive
Chicago, Illinois 60611
312/988-5595
ABA/net: ABA387

1987-88
CHAIRMAN
John K. Uilkema
2001 Ferry Bldg.
San Francisco, CA 94111
415/433-4150
CHAIRMAN-ELECT
Joseph J. Previto
Empire State Bldg.
New York, NY 10001
212/736-2080
VICE-CHAIRMAN
Harry F. Manbeck, Jr.
1135 Easton Turnpike
Fairfield, CT 06431
203/373-2446
SECRETARY
Roger Norman Coe
P.O. Box 40
Elkhart, IN 46515
219/262-7937
FINANCIAL OFFICER
David Goldberg
23rd Flr., 605 Third Ave.
New York, NY 10158
212/503-6250
SECTION DELEGATE TO THE HOUSE OF DELEGATES
Morton David Goldberg
36th Flr.
1185 Ave. of the Americas
New York, NY 10036
212/575-8150
LAST RETIRING CHAIRMAN
William Marshall Lee
Ste. 950
150 S. Wacker Dr.
Chicago, IL 60606
312/726-1982
DEPUTY SECTION DELEGATE TO THE HOUSE OF DELEGATES
Joseph A. DeGrandi
1819 H St., NW
Washington, DC 20006
202/659-2811
ASSISTANT TO THE SECRETARY
Brian E. Banner
A3SC
800 N. Lindbergh Blvd.
St. Louis, MO 63167
314/694-1271
ANNUAL PUBLICATIONS EDITOR
Mark T. Banner
125 S. Wacker Dr.
Chicago, IL 60606
312/372-2960
NEWSLETTER EDITOR
Thomas J. O'Brien
Box 13269
39 Old Ridgebury Rd.
Danbury, CT 06817-0001
203/794-6794
COUNCIL MEMBERS
William M. Borchard (1991)
23rd Flr., 605 Third Ave.
New York, NY 10158
Daniel D. Fetterley (1989)
Ste. 1102
735 N. Water St.
Milwaukee, WI 53202
Edward C. Fiorito (1989)
9600 Pacific Ave.
Dallas, TX 75209
William T. Fryer, III (1991)
7507 Clarendon Rd.
Bethesda, MD 20814
Michael K. Kirk (1988)
5981 River Dr.
Lorton, VA 22079
Robert M. Newbury (1990)
Ste. 2800
33 W. Monroe
Chicago, IL 60603
Peter F. Nolan (1988)
500 S. Buena Vista St.
Burbank, CA 91521
Laurence H. Pretty (1991)
Ste. 2000
444 S. Flower St.
Los Angeles, CA 90017
Robert L. Rohrback (1990)
Ste. 4200
20 N. Wacker Dr.
Chicago, IL 60606
Thomas E. Smith (1988)
Ste. 950
150 S. Wacker Dr.
Chicago, IL 60606
Sidney B. Williams, Jr. (1989)
301 Henrietta St.
Kalamazoo, MI 49007
Douglas W. Wyatt (1990)
261 Madison Ave.
New York, NY 10016
BOARD OF GOVERNORS LIAISON
Edward B. Winn
3100 Republic Bank Bldg.
Dallas, TX 75201
SECTION ADMINISTRATOR
Michele A. Kukowski
American Bar Center
750 N. Lake Shore Dr.
Chicago, IL 60611
312/988-5595
ABA/net: ABA387

November 24, 1987

The Honorable Dennis DeConcini
Chairman, Senate Judiciary Subcommittee
on Patents, Copyrights and Trademarks
Dirksen Senate Office Building
Washington, DC 20510

RE: S. 698

Dear Senator DeConcini:

I am writing to express the opposition of the Section of Patent, Trademark and Copyright Law of the American Bar Association to S. 698, and request that this letter and attachments be made part of the November 10, 1987, hearing record. These views are submitted solely on behalf of the Patent, Trademark and Copyright Law Section. They have not been submitted to, nor considered by the ABA House of Delegates or Board of Governors and, therefore, should not be construed as representing Association policy.

Legislation similar to S. 698 was introduced in the last Congress (H.R. 3521 and S. 1980). In response to that legislation, the Section adopted the following resolution at its 1986 Annual Meeting:

> Resolution 306-1
>
> RESOLVED, that the Section of Patent, Trademark and Copyright Law opposes in principle legislation which would impose on the marketplace a particular method of licensing performing rights in copyrighted musical compositions for broadcast purposes, and would prohibit all other methods of licensing such rights which would otherwise be lawful; and, specifically, the Section opposes H.R. 3521 (Boucher) and S. 1980 (Thurmond), 99th Congress, which would amend the Copyright Act to prohibit all forms of licensing musical performing rights in syndicated television programming except for so-called "source" licensing.

The resolution was adopted by an overwhelming 90% favorable vote, indicating the strength of our members' views in opposing such legislation.

The report of the Section committee stated that the proposed legislation would be "contrary to sound copyright principles, an unwarranted intrusion into the workings of the licensing marketplace, and a harmful precedent for other areas of intellectual property." I am enclosing a copy of that report.

S. 698 is virtually identical in language, identical in intent, and would be identical in result to last year's bills. The Section opposes its enactment.

If any further hearings are planned on S. 698, I would appreciate an opportunity for the Section to testify and fully explain its views.

The membership of the Section greatly appreciates your commicment to strengthening protection for American intellectual property at home and abroad.

Sincerely,

John K. Uilkema

John K. Uilkema
Chairman

JKU:mak
Enclosure

cc: Honorable Joseph R. Biden
Honorable Strom Thurmond
Members of the Subcommittee on Patents, Copyrights and Trademarks

who own and operate infringing establishments, or if it is simply an isolated decision.

SUBCOMMITTEE F J. Rush Hicks, Jr., *Subcommittee Chairman*

Subject 6. PERFORMING RIGHTS & BROADCASTERS.

PROPOSED RESOLUTION 306-1. Council Action: Class 2 Approved.

RESOLVED, that the Section of Patent, Trademark and Copyright Law opposes in principle legislation which would impose on the marketplace a particular method of licensing performing rights in copyrighted musical compositions for broadcast purposes, and would prohibit all other methods of licensing such rights which would otherwise be lawful; and

Specifically, the Section opposes H.R. 3521 (Boucher) and S. 1980 (Thurmond), 99th Congress, which would amend the Copyright Act to prohibit all forms of licensing musical performing rights in syndicated television programming except for so-called "source" licensing.

Past Action. None

Discussion. H.R. 3521, 99th Cong. 1st Sess. (1985) (Boucher) and S. 1980, 99th Cong. 1st Sess. (1985) (Thurmond), would drastically alter the long-existing system of licensing performing rights in copyrighted musical compositions to local television broadcasters. At present, at least four types of performing rights licensing are available to broadcasters in the marketplace: (1) the "blanket" license, by which the broadcaster acquires from a performing rights organization (ASCAP, BMI or SESAC) the right to perform the works in that organization's repertory in all programs aired by the broadcaster, usually for a fee based on a percentage of all revenues from sponsors; (2) the "per program" license, by which the broadcaster acquires from a performing rights organization the right to perform the works in that organization's repertory in only those programs specified by the broadcaster, usually for a fee based on a percentage of those programs' revenues only; (3) "direct" licensing, by which the broadcaster acquires the performing right directly from the music copyright owner; and (4) "source" licensing, by which the broadcaster obtains the performing right from the program producer who has acquired it from the copyright music owner. The proposed legislation would designate "source licensing" as the only permissible form of licensing for music in non-network commercial television programming.

The overwhelming majority of television broadcasters have, for the past forty years, used the blanket license to acquire musical performing rights. However, they recently challenged the legality of the blanket license in an anti-trust class action, contending that its existence made the three other forms of music licensing noted above unrealistic. The court held that there was no evidence that the blanket license impeded other forms of licensing. It held further that the broadcasters chose the blanket license because of its many competitive advantages. *Buffalo Broadcasting Co., Inc. v. ASCAP*, 744 F.2d 917 (2d Cir. 1984), *cert. denied*, —U.S.—, 53 U.S.L.W. 3587 (1985). The proposed legislation effectively would reverse the result of *Buffalo Broadcating*.

The broadcaster proponents of the legislation argue that they do not have the bargaining power of the performing rights organizations; that the blanket license results in inflated license fees; that the per program license is cost-prohibitive and its reporting requirements are difficult to comply with; that direct licensing is an impossibility; that producers will not voluntarily engage in source listening; that the marketplace is thus imbalanced; and that the proposed legislation would bring balance to the marketplace.

The opponents of the legislation include creators and copyright owners of music, the performing rights organizations, program producers and syndicators, and representatives of owners of other forms of intellectual property. They respond that broadcasters have always freely chosen the blanket license, negotiated the fees for it in the free marketplace, and that safeguards exist which guarantee reasonable fees should such negotiations fail. (For example, under the consent decree which governs ASCAP, the U.S. District Court in the Southern District of New York will determine "reasonable" blanket and per program license fees; such a proceeding brought by the broadcasters is now pending.) They also reject the claim of unequal bargaining power, noting that the local television broadcast industry has been represented for decades by an all-industry committee, and that the combined power of the broadcasting industry is far greater than that of creators and copyright owners. Thus, the opponents argue, the imposition of source licensing would result in an imbalance in the market favoring the broadcasters. The opponents also point to the *Buffalo Broadcasting* decision which found that alternative forms of licensing were realistically available. They conclude that these bills are nothing more than special interest legislation designed to interfere with the free marketplace, for the purpose of reducing the amount broadcasters pay for copyrighted musical property.

A majority of the Subcommittee members oppose this legislation as being contrary to sound copyright principles, an unwarranted intrusion into the workings of the licensing marketplace, and a harmful precedent for other areas of intellectual property.

The proposed legislation would effectively merge the performing right, now acquired by broadcasters, and the reproduction right (termed a "synchronization" right), now acquired by program producers. Those rights are distinct and are properly kept separate, as the Copyright Act provides (17 U.S.C. §§106 (1) and (4)) and the *Buffalo Broadcasting* case held.

The present marketplace system of licensing allows for a continuing royalty payment for continuing use. The system which the legislation would mandate may result in a one-time buy-out of copyright rights which could seriously harm creators and copyright owners. Any interference in the marketplace is to be avoided; such a drastic interference certainly should not be countenanced.

Finally, the precedent of such legislation could endanger licensing not only of other copyright rights, but of other forms of intellectual property, such as patents, as well. For example, the logic of these bills would allow users of patent rights who do not find existing forms of a patent licensing to their liking to seek imposition of a Congressionally-mandated licensing form more to their liking. The Subcommittee does not believe intellectual property rights should be subject to such erosion.

As the Subcommittee report has been written, initial hearings on H.R. 3521 have been scheduled for March 19, 1986. The Subcommittee also notes that the American Intellectual Property Law Association has adopted a resolution opposing these bills.

QUESTIONS AND ANSWERS

MOTION PICTURE ASSOCIATION
OF AMERICA, INC.
1600 EYE STREET, NORTHWEST
WASHINGTON, D.C. 20006
(202) 293-1966

MICHAEL R. KLIPPER
COUNSEL
GOVERNMENTAL AFFAIRS

December 21, 1987

Ed Baxter, Esq.
Chief Counsel and Staff Director
Senate Judiciary Subcommittee on
Patents, Copyrights and Trademarks
SH-327 Hart Senate Office Bldg.
Washington, D.C. 20510

Dear Ed:

Enclosed please find the responses of Mel Blumenthal, Executive Vice President, MTM, to questions posed to him by members of the Judiciary Committee on source licensing during the 99th Congress. As I mentioned previously, these responses were inadvertently omitted from last year's hearing record. We would appreciate their inclusion in this year's hearing record on S. 698.

Thank you for your cooperation.

Sincerely,

Mike

MTM

MEL D. BLUMENTHAL
Executive Vice President

DIRECT DIAL NUMBER:
(818) 760-5731
TELEX: 350862

April 24, 1986

Senator Charles Mathias
Subcommittee on Patents, Copyrights
and Trademarks
United States Senate
Washington, D.C. 20510

Dear Senator Mathias:

Pursuant to your request, I am enclosing answers to questions posed by yourself and Senator Thurmond regarding my April 9 testimony.

Sincerely,

MEL D. BLUMENTHAL

MDB/bb

Enc.

bcc: Lisa Rickard

• STUDIO CENTER • 4024 RADFORD AVENUE • STUDIO CITY, CALIFORNIA 91604 •

QUESTIONS FOR MR. MEL BLUMENTHAL
FROM SENATOR STROM THURMOND

1. YOUR STATEMENT (P. 4) SUGGESTS YOU GET BETTER MUSIC BECAUSE YOU CAN PAY COMPOSERS LESS UP FRONT BUT OFFER THEM AN "ANNUITY" WHICH DERIVES FROM ASCAP AND BMI DISBURSEMENTS LATER ON. ISN'T THIS FOR ALL PRACTICAL PURPOSES THE SAME SYSTEM YOU USE FOR ALL TALENT (ACTORS, SCRIPTWRITERS AND OTHERS) YOU HIRE, BY PAYING THEM RESIDUALS EACH TIME A SHOW IS LICENSED IN SYNDICATION?

2. WHY COULDN'T YOU USE A RESIDUAL SYSTEM TO ATTRACT GOOD COMPOSERS UNDER THE MARKETPLACE CONTEMPLATED BY S. 1980?

3. WHAT MAKES COMPOSERS DIFFERENT FROM SCRIPTWRITERS AND OTHER "AUTHORS" UNDER THE COPYRIGHT LAW WHOM YOU EMPLOY? WHY SHOULD THEIR WORKS BE TREATED DIFFERENTLY? WOULD YOU FAVOR LICENSING ALL ELEMENTS OF YOUR PROGRAMMING UNDER AN ASCAP/BMI TYPE OF SYSTEM?

RESPONSES TO SENATOR STROM THURMOND

1. We as producers do not offer composers an annuity. The annuity arises by reason of the Copyright Law; certainly both parties conduct their negotiations with full knowledge of and reliance on these payments. Actually the residual system for other creative talent such as writers, directors and performers is a more mechanical process, reflecting neither the way their work is used within the program, nor the extent of broadcast and other uses of the program. Because neither the unions and guilds representing the aforesaid creative talent nor the producers have the ability to perform the massive tracking and monitoring task a more precise

system would demand, we have negotiated a flat fee residual, with payments on a descending scale. But each residual payment is made only once for each run, notwithstanding whether a program "runs" in one city or in 250 cities. Contrast this with the music performing rights societies' method under which payments to composers are based on not only the number of stations broadcasting the show but also on the way a piece of music is used within the show, e.g. the societies distinguish between uses of theme, feature and background music.

But the essence of the issue before Congress is not whether some form of residual system can be fashioned, but whether there is a convincing rationale for changing the existing system.

The performing rights concept of continuing payments for continuing use is established by copyright law. The composers who create the works feel that they are fairly and adequately compensated under the current system and (consistent with the law's intent) the current system encourages them to continue to create. No new composers are precluded from joining the existing system and the system functions in an amazingly efficient manner. The only beneficiary of a change in the system is the broadcaster, who will no longer pay for his performance of the composers' music. While certainly that motivation is understandable in a marketplace setting it hardly establishes a public interest basis for changing the law.

2. It is difficult to determine what kind of marketplace S. 1980 contemplates, but it is certainly not a free one. Other than to mandate one way of doing business, the bill is silent on the issue of the marketplace. And broadcaster testimony seemed to be inconsistent in its

responses. Good composers certainly can be attracted in a number of ways, but they are obviously attracted by the current system. The question is, can a new system be as attractive to them as the current one. Mandatory source licensing imposes financial commitments on a producer without concomitant commitments from the broadcaster, so producers will be forced to absorb the full cost of any new payment scheme devised. Since producers simply cannot absorb additional residual payments, composers would not receive the same compensation they receive now. If it is financially less attractive to compose music for television programming, established as well as new composers will be lost to the medium and to the public.

3. Composers are creators and writers are creators. That their works are treated differently under Copyright Law is largely a result of the nature of the works themselves, and has developed historically. Music lends itself to a broader range of separable public performances, e.g. in restaurants, hotels, stage shows, elevators, radio, television and films, etc. Music seems so pervasive as to be free, and that fact led to a system under which creators of music could be assured compensation for the public performance of their works -- a basic entitlement under the Copyright Law. Producers did not write the law; we have simply tried -- along with the performing rights societies -- to comply with the law in as fair and efficient a manner as possible. To treat composers' works differently would be to penalize them as creators.

If other creative elements in a television show could be licensed for performance under a system as efficient and as fair as that of ASCAP/BMI most creators would probably favor that system. I would guess that an actor, for instance, would be delighted to receive a larger residual for a guest starring part than the actor who has a one-line walk-on, and would prefer that his compensation increase as the number of markets airing his show increase.

QUESTIONS FOR MEL BLUMENTHAL
FROM SENATOR CHARLES MATHIAS

1. Mr. Blumenthal, your company has several successful programs now on network television, and several others now in syndication. With regard to these programs, who owns the right to publicly perform the music in the sound-track of these programs?

2. If S. 1980 were law, how would your company acquire the performance right in the music in these programs so that you could comply with the law and provide that right in a total package with other program rights when you sell that program to a local television station?

3. How would passage of S. 1980 affect the way you now do business with composers who write for your shows, and with TV stations? How would its passage affect syndication contracts now in effect?

RESPONSES TO SENATOR CHARLES MATHIAS

1. MTM makes extensive use of both work-for-hire and preexisting music in our shows. The copyright in music composed for MTM as a work for hire is owned by MTM's production entities and is subsequently assigned to a music publishing company for separate exploitation. (A more comprehensive explanation of the role of music publishing companies is found on pages 5 and 6 of my testimony of April 9, 1986.) Performing rights income is divided equally between composers and publishers, with a composer receiving his 50% share directly from ASCAP, BMI or SESAC. Many composers also have publishing companies which contractually participate in the publisher's share of such income, and in a few cases in the copyright itself. Publishing rights in the theme music for each of MTM's current series are held as follows:

"HILL STREET BLUES" - MTM Music, Inc. and Darla Music (Mike Post)

"MARY" - MTM Music, Inc.

"NEWHART" - MTM Music, Inc. and Hollyweed Music (Henry Mancini)

"REMINGTON STEELE" - MTM Music, Inc. and Hollyweed Music (Henry Mancini)

"ST. ELSEWHERE" - Mimsey Music, Inc. and Roaring Fork Music (Dave Grusin)

On our major series in syndication, publishing is held as follows:

"LOU GRANT" - Mimsey Music, Inc. and Workers Union Music (Patrick Williams)

"RHODA" - Izzylumoe Music (Billy Goldenberg)

"WKRP IN CINCINNATI" - MTM Music, Inc. and Fast Fade Music (Thom Wells)

"THE WHITE SHADOW" - MTM Music, Inc. and Darla Music (Mike Post) and Marbo Music (Pete Carpenter)

In addition to the theme music referred to above we license a great deal of music from outside publishers which is used in each series episode. The composers and the publishers of that music retain all public performing rights to that music and to the performing rights income derived therefrom. MTM holds no public performance rights in any of the outside music we license.

2. If S. 1980 were law MTM would out of the necessity to obtain the performing rights, be required to negotiate a flat up front fee with the composer for all rights in the music. MTM would be unable to get the stations to participate in the payment for performing rights, therefore continuing payments to composers for such rights would disappear as a result of the passage of this bill. Unfortunately, that would prove a disincentive to most American composers, and a general decline in the quantity and quality of their music used and composed is the probable result. To fill the gap, producers would increasingly look to foreign composers who are willing to work for lower fees, to foreign prerecorded music tracks and to preexisting public domain themes and compositions.

3. As indicated above, if S. 1980 were passed into law, the impact on MTM's business dealings with composers would be significant. Producers do understand and are willing to undertake the entrepreneurial risks inherent in getting a show from the pilot stage to successful syndication. These risks, however, have lately been increased by the occurrence of several events: rising production costs, often uncontrollable because they are dictated by collective bargaining agreements; a leveling off of network license fees; and a much softer syndication marketplace. Under the circumstances, with deficits escalating to unheard of levels, MTM and producers like us certainly cannot agree to accept the unrecoupable additional cost of a large increase in composer's fees -- whether the increase is in the form of an upfront payment or in some form of royalty or residual scheme. The result to composers is simple; they will receive less money.

On the other hand, our business relationships with television stations will not change. With the exception of a few highly touted "stellar" deals, syndication program prices are leveling off, and in more than a few cases, decreasing. It is a buyer's market where more shows compete for airtime than there are broadcast slots available. MTM, like all producers, will continue to be a strong competitor in the marketplace. But neither MTM nor other producers and syndicators will have the leverage to persuade a station (which has no legal obligation to do so) to pay additional money to cover a producer's outlay for performing rights costs. Mr. Padden of the INTV stated as much in his testimony on April 9, when he cited the high sales figures generated by "Magnum P.I." as evidence to justify the broadcasters position. Unfortunately, however, for producers most shows are not going to generate the income of "Magnum", so Mr. Padden's example, using the highest priced program in the syndication market as the basis for a plan to mandate source licensing, seems less than valid. Nevertheless, he has given us a clear indication of the response producers can expect when they attempt to recoup performing rights fees from the stations.

As to the effect of this bill on contracts already in existence, producers can only foresee chaos. In MTM's case, we have contracts with composers dating back to the inception of the company. For the most part, these are work for hire contracts which, as part of a composer's consideration, enumerate very specific payments for different uses of his music. Included in the schedule of payments is a provision for performing rights income, assuring to the composer 100% of the writer's share of performing rights income.

Other contracts currently in effect are station license agreements, stating in their terms that stations hold valid performing rights licenses and will be responsible for payment of music performing rights.

Almost all of these contracts -- and all of the composer's contracts -- extend past the one-year grace period set out in S. 1980.

If S. 1980 becomes law the industry will be faced with circumstances which were not in the anticipation of the parties when they contracted, and for which no answers are readily available or easily solvable. Will stations broadcasting product under old agreements be violating copyrights? Will they be in breach of contract with distributors? Will producers be in breach with composers and distributors? And, how, when there are literally thousands of shows available for sale in the syndication marketplace, will producers and distributors find composers and/or their representatives after the lapse of so many years? Will all contracts have to be renegotiated? If so, producers will have to hire whole staffs to do so. What if a new deal cannot be made? And, equally important, on older shows where station deals are already in place, who is going to pay for this massive reorganization process?

From all of this chaos, can there come order?

Motion Picture Association
of America, Inc.
1600 Eye Street, Northwest
Washington, D.C. 20006

RESPONSES BY MR. JACK VALENTI, PRESIDENT
MOTION PICTURE ASSOCIATION OF AMERICA INC.
TO QUESTIONS SUBMITTED FOR THE RECORD
BY SENATOR PATRICK LEAHY
HEARING ON MUSIC SOURCE LICENSING
APRIL 9, 1986

1.) When motion pictures are shown in movie theaters, how is the public performance of music contained in the motion pictures licensed?

A more detailed discussion of the licensing of music performance rights for theatrical exhibition of motion pictures is contained in my response to question #1 posed by Senator Thurmond (attached). Briefly, with respect to theatrical exhibition of motion pictures in this country, music performance rights are source licensed at the same time as synchronization rights. This is in contrast to the situation in virtually every other country, where music performance rights for the exhibition of films are licensed through performance rights societies and not at the source.

2.) Do the producers obtain the public performance rights from the songwriter at the time the motion picture is produced?

To the extent the music contained in the motion pictures is pre-existing, the public performance rights are already held by the songwriter in conjunction with a music publisher. In those instances where the music is specifically created for the motion picture and qualifies as a work for hire, the federal copyright law gives the producer of the motion picture all rights, including the right to publicly perform the music.

Irrespective of whether music used in motion pictures is pre-existing or is specifically created for the motion picture, the songwriter has been able to retain through negotiation and by industry practice the right to receive continuous payments from the performing rights societies for the ongoing use of his or her music in all media in this country and abroad (with the sole exception of the theatrical exhibition in the United States).

3.) Do songwriters receive continuing royalties from the fees you collect for theatrical distribution?

As a general rule, songwriters do not receive continuing royalties from the fees motion picture distributors collect for the theatrical exhibition of their films, but a few songwriters, with sufficient bargaining power, do negotiate agreements which provide them with a share of the box office revenues generated by theatrical exhibition of motion pictures in this country. These payments are not to be confused with the continuous royalties paid to songwriters by the performing rights organizations in this country for use of their music in all media other than the theatrical exhibition of motion pictures.

4.) Broadcasters argue that television producers rather than songwriters are the real parties in interest in this dispute. They argue that producers have secured and hold 90% of the copyrights on music contained in syndicated programming. Is that correct?

Please see my attached response to question #2 posed by Senator Thurmond.

5.) If that is correct, doesn't that undermine the theory of the blanket license which is that it would be impossible to negotiate with tens of thousands of songwriters around the country for their music?

Please see my attached response to question #2 posed by Senator Thurmond.

6.) What percentage of the money collected by ASCAP and BMI, that is generated by the blanket licensing of music on non-network television, actually goes to television production companies or their music publishing subsidiaries?

MPAA does not have access to these numbers. It has asked ASCAP and BMI to generate the figures requested with respect to music publishing companies affiliated with MPAA member companies.

7.) Why do you treat songwriters differently from script writers when it comes to securing and licensing public performance rights?

The reason that songwriters and scriptwriters have different compensation schemes is quite simple. Songwriters and scriptwriters have each negotiated in the open marketplace their own separate and distinct forms of compensation. In neither case was the system unilaterally imposed on the creative artists involved. In contrast, this legislation would legislatively and unilaterally negate the system chosen in the open marketplace by songwriters.

The different systems chosen by songwriters and scriptwriters are designed to account for the difference in the two products. As a general rule, scripts do not have a "commercial life" separate from the film or program in which they are incorporated.

By contrast, songs do have myriad other uses which are separate and apart from the motion picture in which the music is used. For example, the same music which may be used in a motion picture is performed in concerts, cabarets, bars or restaurants and can be performed on a radio, record player, jukebox, or tape machine.

The separate commercial life of music helps explain why songwriters have chosen a system where a single entity - - one of the performing rights organizations - - licenses and monitors the use of their music and collects and distributes royalties as well.

Producers and broadcasters alike have successfully adapted to the open market system which has evolved for songwriters. The current system works. Congress should leave it unchanged.

QUESTIONS FOR MR. JACK VALENTI FROM SENATOR STROM THURMOND

1Q. Please explain what, if any, distinctions you believe exist that justify the application of source licensing when studios lease their movies to theatres, but blanket licensing were that same movie to be leased to a broadcaster.

1A. It is essential to understand the unique circumstances which led to source-licensing of motion picture music for theatrical exhibition in the U.S.

The practice in the United States of source-licensing music in motion pictures to theatres is an aberration on an international scale. In every other nation in the world with advanced copyright law, motion picture theatres obtain blanket licenses.

Source-licensing of motion picture music in the U.S. arose out of the so-called Alden-Rochelle case, in which a federal court prohibited ASCAP from blanket-licensing motion picture theatres. At that time, ASCAP was the exclusive agent for its composer members. ASCAP is now prohibited from representing its composer/members on an exclusive basis (as is BMI). This problem is long since cured -- thus, the theatrical exhibition anomaly is no meaningful precedent for today's TV syndication marketplace.

Proponents of S. 1980 argue that composers of movie music receive "adequate" compensation through source licensing when their works are shown in U.S. theatres, thereby justifying the mandated source-licensing they seek for syndicated TV shows. In fact, the limited compensation to composers under source licensing for theatrical runs is only tolerable because it is supplemented from blanket license receipts for uses of the music in other media: theatrical runs or TV broadcast of the motion picture abroad, TV network or local broadcasts of the motion picture domestically, performance of the music apart from the motion picture in, e.g., jukeboxes, dance halls, radio broadcasts, lounges, and virtually all other public settings.

Moreover, there is a fundamental distinction between the business relationships in which motion picture producers engage with movie theatres, and those in which they engage with TV stations. Program producers and syndicators would be delighted to contract with TV stations just as they do with motion picture theatres: on a "percentage rental" basis, similar to the percentage producers receive from theatre owners. This fundamental distinction between business relationships makes clear why source licensing should not be mandated for local TV broadcasts.

The suggestion that source-licensing of motion picture theatres is an appropriate model for the TV syndication market is inapposite. They are fundamentally different businesses.

2Q. i. I have information that suggests that the rights to 90 percent of the copyrighted music in syndicated shows is actually owned by the studio/producer rather than the composer. Do you agree with this figure?

ii. The broadcasters argue that the studios seek to preserve the blanket license system because they get the 50 cents on every dollar returned to the publishing houses the studios own. What is your best estimate of the dollar amount economic impact of S. 1980 on those studios you represent?

2A. i. The broadcasters frequently assert that program producers own the rights to 90 percent of the music in their shows, yet they provide no source for this figure, and we know of none.

The broadcasters' unsupported estimate is grossly out of line with the actual composition of today's TV program syndication marketplace, which is marked by a massive number of syndicators -- literally hundreds, an astounding variety of shows and movies -- literally thousands, and an incredible variety of music obtained from myriad sources.

Syndicated TV programming may include:

--"off-network" series, comprised of episodes which previously ran on one of the three national TV networks (e.g., M*A*S*H, which ran on the CBS Television Network);

--theatrical motion pictures (from the earliest days of cinema to the present);

--"first-run" weekly drama and situation comedy series produced expressly for syndication (e.g., the weekly series Fame, What's Happening Now, and It's a Living);

--first-run syndicated variety, talk and music programming (e.g., Solid Gold, The Merv Griffin Show, New York Hot Tracks);

--first-run daily series which are "stripped", i.e., run each weekday at a fixed time (e.g., the nightly Entertainment Tonight information series, the daily Wheel of Fortune, Jeopardy, and $20,000 Pyramid game shows);

--religious programming (e.g., The Christophers, The 700 Club).

This is just a representative sampling of shows. There are scores of programs in each of these categories (and, of course, thousands of theatrical motion pictures) in syndication.

In each of these programming categories, programs use an abundance of both "inside" music (composed expressly for the show in which it appears) and "outside" music (pre-existing music licensed for use in the show). There is simply no way that the percentage of music in these shows controlled by the producer can remotely approximate the 90% number cited by the broadcasters.

ii. Again, the broadcasters overstate their case.

First of all, most syndicators active in the TV market do not have music publishing subsidiaries.

Second, most music publishers are not affiliated with program producers and syndicators.

Third, as noted above, many programs (especially variety, "top-ten", music video and other programs featuring performances) use a great deal of pre-existing music by a huge number of different composers and publishers. In these cases, the producer or any publishing subsidiary he may have does not share in any public performance revenues for this music.

Fourth, to the extent that program producers are affiliated with publishers, they are only entitled to the publisher's share of receipts from public performances if the affiliated publisher owns the right in a composition used in the show. So if MCA, for example, produces a dramatic series which makes great use of music written by the Beatles (which is not published by an MCA subsidiary), distributions for performances of that music go to the Beatles' publisher, not MCA's publishing subsidiary.

Fifth, the 50 percent share of public performance royalties allocated to publishers under performing rights society agreements is a maximum. It is not uncommon for a composer to negotiate to "co-publish" his works with the publisher; by this arrangement, the publisher agrees to pay to the composer some additional percentage of the publisher's share of public performance royalties. In some instances, the composer may retain all publishing rights.

Sixth, any split between composers and publishers of revenues from public performances of copyrighted works represents fair compensation to publishers for the substantial responsibilities they assume, nurturing newcomer composers, seeking use of their works by all possible users, auditing such uses, monitoring the technical and legal complexities involved in protecting copyrights, and so on. If revenues to publishing subsidiaries are severely depleted, it is likely that these publishers will not be able to provide the many important services to their composer partners -- both those composers who write for TV, and those whose works are primarily used in other media -- that they provide today.

Seventh, it is simply wrong to suggest, as the broadcasters do, that the major Hollywood producers are the dominant beneficiaries of publisher distributions of public performance royalties. The broadcasters should, in the spirit of full disclosure, note that among the recipients of the largest distributions are subsidiaries of several major broadcasting entities.

3Q. Mr. Padden testified to the significant increases in the payments made by stations to studios for syndicated programming. Is it correct to assume that these payments were made as the result of negotiations on the price of the program package in question? Why do you assume you won't be paid properly in the full and open give and take negotiations where the value of the entire product, including the music rights, is on the bargaining table?

3A. The TV syndication marketplace is already a buyers' market. If S. 1980 were to pass, the government would improve broadcasters' already enviable position, placing them firmly in the catbird seat.

The TV syndication marketplace is highly competitive, and weighted in favor of the buyers (i.e., local TV stations). Nationwide, there are far more TV program producers and syndicators with far more programs for sale than there are available time slots to show these programs. It is typical for a syndicator to have only three or four potential buyers in a TV market.

As I mentioned in my prepared statement, the competition among syndicators for limited outlets is intense. For example, the 1986 Broadcast Information Source Books, the industry resource on available TV programming, lists almost 500 syndicators/distributors, offering approximately 10,000 series programs and 25,000 features, movies or mini-series to U.S. TV stations.

For the average syndicator (as opposed to those few fortunate syndicators that may market blockbuster programs in any given year), it will simply not be possible to extract any additional payments out of broadcasters for music rights -- particularly because the broadcasters state they have no intention of bargaining for these rights independently. Music rights would become just another cost of doing business -- but one that the government would unjustly force the producer and syndicator to swallow, to the broadcaster's benefit.

There can be no reasonable prospect that most syndicators/producers will successfully recoup these additional costs. Mr. Padden himself told the Congress in no uncertain terms that broadcasters have no intention of paying the additional costs which program producers and syndicators would be forced to bear were this bill to become law. I quote: "Surely, within the king's ransom we pay for our programs, the necessary dollars can be found to cover the music that is incidental to those programs."

History bears out my point. As I note in response to Question 1 from Senator Mathias, broadcasters in the past have never offered to pay for these rights in the open market. Why should we expect them to behave any differently if this legislation is passed and the market is further skewed in their direction?

The broadcasters would have no cause to pursue this legislation were they not convinced that it would shift the balance of power in negotiations even more firmly in their favor; their sole purpose in this exercise is to save money, at the expense of composers and producers.

QUESTIONS FOR MR. JACK VALENTI FROM SENATOR DENNIS DeCONCINI

1Q. In arguing against S. 1980 you state that this bill is simply an effort by one of two parties to a judicial proceeding to get Congress to overrule a negative judicial decision and in effect give that side the victory it was unable to legitimately obtain in the Courts. What is wrong with that? Isn't it inherent in our Constitutional system of separation of powers that if Americans don't agree with the Court's interpretation of the law, they can petition Congress to change it? It seems to me that much of the legislation we in the Senate consider is because someone is unhappy with the decisions of the Federal Courts (Habeas Corpus, Exclusionary Rule, NFL Bill, DeConcini-Moakley [unhappy with Executive Branch]).

1A. We do not challenge the right of any citizen to petition his government for legislative relief under our Constitutional system. The mere fact that a matter has been litigated in not inherently a bar to this right.

In the instant matter, the broadcasters have every right to bring their case before Congress. We say only that their case is without merit, and that most of the factual assertions upon which it is based have been subject to the crucible of an adversary hearing and have been rejected in toto.

Let us take only one significant example:

The All-Industry Committee relies heavily in its arguments before Congress on the alleged "efforts" of its member stations to obtain source-licensing from producers and syndicators during the pendency of the litigation. The All-Industry Committee alleges that the record indicates the "intransigence" of producers and syndicators to source-licensing.

But the All-Industry Committee chose not to tell the Congress that these "efforts" were reviewed in detail and summarily rejected by the Second Circuit, which termed the broadcasters' gambit a "transparent effort to assemble, in the midst of litigation, evidence that they tried to obtain source licensing."

This, and virtually all of the key contentions of the All-Industry Committee, have been weighed and discarded by the courts. These determinations should be carefully considered as Congress undertakes its own fact-finding. It is the failure of the All-Industry Committee to give any consideration to the court's findings, and that Committee's failure to apprise Congress fully of these findings, to which we object.

The situation before you now is further distinguished by this key difference: a federal court exercises continuous jurisdiction over this matter, assuring broadcasters access to a judicial remedy. The courthouse door is always open for the broadcasters.

The broadcasters have taken advantage of their right to make their case to the Congress. It is a case without merit, and should be summarily rejected.

QUESTIONS FOR MR. JACK VALENTI FROM SENATOR CHARLES MATHIAS

1Q. Mr. Valenti, we heard during the hearing that producers and syndicators are unwilling to provide pre-cleared programming to television stations. Since many of these producers are members of your organization, can you shed any light on negotiations between producers and television stations for source licensing?

1A. The history of "negotiations" for source-licensing indicates that (1) the broadcasters never even sought source licensing until they were in the midst of litigation over the blanket license, and (2) the broadcasters' idea of "negotiation" has been to amend their syndication contracts unilaterally to insist on source licensing, rather than to make an offer of consideration which could form the basis for negotiation.

There was never a request for source-licensing by the broadcasters until 1 1/2 years after the Buffalo Broadcasting litigation commenced. Even then, this concerted effort made by the broadcasters was viewed by the Second Circuit as nothing more than a "transparent effort" to create a paper record for purposes of the trial.

While broadcasters may have made sporadic "efforts" to acquire source-licensing since that time, I am aware of no requests that meet the fundamental criterion suggested by Circuit Court Judge Newman: " ...the customary indicator of a buyer's seriousness in attempting to make a purchase -- an offer of a sum of money."

In their attempts to persuade the Congress that their efforts to acquire source licensing were stonewalled by producers, the broadcasters have quoted various written responses they received while perpetrating their "gambit" during the litigation. The quotations the broadcasters cite are always full of ellipses... but the language between the ellipses tells a very different story.

The All-Industry Television Music Licensing Committee says that Paramount Picture Corp.'s response was, "Your suggestion... to clear music... 'at the source' is impractical." The Committee does not tell you that Paramount also expressed its "willing-[ness] to consider any fair and concrete plan that [the customer] would like to propose... "

Similarly, the All-Industry Committee says Warner Communications, Inc. found "questions... (as to) the economic benefit... to be derived by Warner." But a look at the letter in its entirety shows that Warner explicitly solicited additional ideas from the customer on how source licensing might work, and recommended a follow-up meeting on the matter.

A review of the full text of these letters paints a very different picture than that created by the broadcasters. (I am submitting copies of both of these letters in their entirety for the record.) I believe the nature of the questions raised by the producers in these letters represent very reasonable questions that any businessman would ask before pursuing a business venture.

Broadcasters could seek source licensing in today's marketplace by engaging in good-faith negotiations. But to date, they have failed to do so. As an executive of Warner Communications has written to this Subcommittee, his company is willing to consider any good faith proposal for source licensing; however, he continued, "We have yet to receive a serious proposal from a broadcaster for licensing music at the source."

No producer or syndicator with any sense will fail to be responsive to a firm proposal from a valued customer acting in good faith. The broadcasters would do well to take advantage of their privileged situation in the marketplace to seek source licensing through free and open negotiations.

2Q. Many of your member companies are industry giants. Do you believe that if S. 1980 were enacted, production companies would not be able to bargain effectively with TV stations to assure some return for their investment in the music embodied in their programs?

2A. As I noted in some detail in my written response to Senator Thurmond, the broadcasters already enjoy the upper hand in marketplace negotiations for syndicated programming. This legislation would further entrench their advantaged bargaining position.

The legislation would compel producers and syndicators to deliver an additional right which today they do not routinely obtain, convey, or need. The legislation would not compel broadcasters to pay a fair marketplace price for this additional conveyance.

As both the president of the Association of Independent Television Stations (INTV) and the licensee of KWTX-TV in Waco, Texas, plainly told this Subcommittee, broadcasters have no intention of paying producer/syndicators for the additional right which this bill would force them to convey as a condition of doing business.

S. 1980 would preclude all marketplace options for acquisition of music rights in syndicated TV shows other than source licensing. I am convinced that this would necessarily and unfairly constrain producers and syndicators in their negotiations with broadcasters.

3Q. Current practice in your industry recognizes that the composer benefits financially when his music is performed in television programs. Other contributors to the TV production -- for example, scriptwriters and actors -- also benefit from later performances. The composer is paid through the performing rights societies, while the others enjoy residuals under their contracts with the production company.

If S. 1980 were to become law, couldn't the composer be paid in the same way the actor and scriptwriter are now -- through residuals? What is sacred about the current system of compensating composers for later performances?

3A. There is a single, successful system in place through which composers receive compensation for public performance of their music in virtually every medium: the blanket license. The system meets the needs of the creators and users of copyrighted music.

Any new system to which this bill may give rise would be unnecessarily duplicative and costly. Under S. 1980, composers would have to devise elaborate mechanisms to monitor performances of their copyrighted music in a single medium -- non-network television, and to collect royalties; the form such a system would take is at best conjectural. Meanwhile, the current performing rights system would have to remain in place to pay composers for the performance of their copyrighted music in virtually every medium other than non-network television.

And, under S. 1980, the blanket license would remain in effect for a substantial amount of programming broadcast by local TV stations, including locally-produced programs and all live syndicated programs.

Why should Congress be compelled to reinvent a wheel that already rolls? Why should Congress be party to a massive intrusion into the way business has been done for decades, when the system works and works fairly, and when the system will remain in effect for all other users of copyrighted music?

4Q. Your members deal in lots of old music as well as new music. Films that are twenty, thirty or forty years old are still shown on television. As a rule, does the producer or syndicator now own the right to perform the music in these films? If S. 1980 were passed, how would the producer or syndicator go about securing these rights for sale to TV stations? What sort of burden would this impose?

In your answer please address how this legislation would affect the sale of television programming that was made for the networks last year, and in the 1950s, as well as television programming that embodies substantial outside music.

4A. The sum total effect of passage of S. 1980 would be to visit chaos upon the TV syndication marketplace.

The question quite properly suggests that every contract for music rights in every pre-existing recorded work that might enter the TV syndication marketplace would have to be revisited to determine with certainty who holds the rights in the compositions, and whether the public performance rights can be secured.

For older works -- decades-old motion pictures and series that comprise a very large percentage of shows in syndication -- this task would be truly daunting. While some quantity of music may have been composed expressly for use in a particular film or show, the use of pre-existing music was extremely common.

Let me offer you just two isolated incidences: the classic 1943 film Casablanca, which has been in TV syndication for many years, and National Lampoon's Vacation, a more recent film which will likely enter syndication after completing its network run (the film has recently appeared on the CBS network).

The score of Casablanca contains 11 "outside" songs (i.e., none of the music rights belong to the company which owns the film). Twenty different composers and lyricists are credited with writing these songs; yet another composer is credited with the score (see attachment). The vast majority of these composer/lyricists are now deceased, yet many of their copyrights have presumably passed to their heirs and assigns. Imagine if you will the cost and nuisance of attempting to track down with certainty all the rightsholders to this music in this one film. Multiply this times several thousand feature films, and the magnitude of the problem becomes clear.

Twelve different composers and lyricists are credited with the nine "outside" songs in Vacation; two additional composers are credited with the score (see attachment). Given the extraordinary popularity of motion pictures as a pop music medium over the past 15 years, it is probable that the problems exemplified by the Casablanca example would be exacerbated for recent films.

The problems of source-licensing would also affect off-network television series. Consider, for instance, off-network cartoon series such as The Jackson Five and The Beatles; or off-network variety series such as Lawrence Welk and Carol Burnett and Friends. These are examples of the many older off-network shows that make substantial use of "outside" music, which poses the same clearance problems discussed above.

I must also stress that so much of the programming in today's syndication market is first-run, i.e., new shows made expressly for that market. Many of these shows make great use of pre-existing music. If source-licensing is mandated for every producer regardless of circumstance, many of these shows would be particularly vulnerable.

A variety, entertainment, top-ten, or music video show may use a dozen or more preexisting songs per show. Many of these shows are produced on a tight weekly (or even daily) timeline, with small staffs and limited budgets. The squeeze on their time and their bottom line may be too great for many, and these shows could become an endangered species.

Irrespective of when a program was made, the music rights clearance problems are fundamentally the same. Clearly, these problems are even greater for older programs, and for the many current shows produced on tight timelines and using substantial outside music.

The chaos that would result from mandated source-licensing would not be counterbalanced by any benefit to TV viewers. What public policy reason could justify an effort by the Congress to inflict such a body blow on the TV syndication business?

CASABLANCA - 1943

Score by:	Max Steiner
Songs (all outside):	
"Shine"	Lew Brown, Ford Dabney, Cecil Mack
"It Had to Be You"	Gus Kahn, Isham Jones
"Crazy Rhythm"	Joseph Meyers, Roger W. Kalm, Irving Caesar
"Knock on Wood"	M.K. Jerome, Jack Scholl
"The Very Thought of You"	Ray Noble
"Baby Face"	Barry Davis, Harry Akst
"I'm Just Wild About Harry"	Eubie Blake
"Heaven Can Wait"	Eddie DeLang, Jimmy Van Heusen
"Speak to Me of Love"	Jean LeNoir
"Love for Sale"	Cole Porter
"Avalon"	Al Jolson, Vincent Rose

NATIONAL LAMPOON'S VACATION

Score by:	Ralph Burns, Chris Boardman
Songs (all outside):	
"Holiday Road"	Lindsay Buckingham
"Dancing Across America"	Lindsay Buckingham
"Mockingbird"	Charlie Foxx, Inez Foxx
"Blitzkrieg Bop"	The Ramones
"Mr. Blue"	DeWayne Blackwell
"I'm So Excited"	The Pointer Sisters, Trevor Lawrence
"Easy So Dull"	Dez Dickerson
"Little Boy Sweet"	Frannie Gold, Peter Ivers
"Summer Hearts"	Terry Sampson, Peter McCann

Paramount Pictures Corporation

LEONARD KALCHEIM

November 10, 1981

Francis A. Martin III
President
Chronicle Broadcasting Company
1001 Van Ness Avenue
San Francisco, California 94109

RE: MUSIC PERFORMANCE RIGHTS CLAUSES

Dear Mr. Martin:

Richard Frank has referred your October 7, 1981 letter to me for reply.

Your suggestion for Paramount to clear music contained in syndicated programs "at the source" is impractical. The properties Paramount currently distributes consist for the most part of theatrical feature films or off-network television series where the music included was never cleared at the source. To do so now would be to undertake an unnecessarily burdensome job when compared to the long standing industry practice.

With regard to first run productions, we do not agree with the statement in your letter that the total expenditure for music performance rights would be considerably less than those fees currently paid by your stations. Notwithstanding this, Paramount is willing to consider any fair and concrete plan that Chronicle, as a valued customer, would like to propose in connection with the acquisition of music performance rights.

Very truly yours,

Leonard Kalcheim
LK/1
cc: Richard Frank

5555 Melrose Avenue Los Angeles California 90038 (213) 468 5000